CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 40 **FEBRUARY 15, 2006** **NO. 8**

This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

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Bureau of Customs and Border Protection

General Notices

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, February 1, 2006,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

19 CFR PART 177

REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERAMIC ARTICLES "AVAILABLE IN SPECIFIED SETS"

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of two ruling letters and revocation of treatment relating to the tariff classification of ceramic table and kitchenware "available in specified sets" under the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA").

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection ("CBP")

is revoking two rulings concerning the tariff classification of ceramic articles "available in specified sets" and is revoking any treatment CBP has previously accorded to substantially identical merchandise. Notice of the proposed revocations was published on December 7, 2005, in Vol. 39, No. 50 of the *Customs Bulletin*. Two comments were received in response to the notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 16, 2006.

FOR FURTHER INFORMATION CONTACT: Andrew M. Langreich, Tariff Classification and Marking Branch: (202) 572–8776.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts that emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to CBP's obligations, notice proposing to revoke New York Ruling Letters ("NY") B88253, dated July 30, 1997, and NY 813612, dated September 13, 1995, was published on December 7, 2005, in Vol. 39, No. 50 of the *Customs Bulletin*. Two comments were received in response to the notice.

As stated in the proposed notice, the revocation actions will cover any rulings on this merchandise that may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings other than those herein identified; no further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice

memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. § 1625(c)(2)), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importers or their agents for importations of merchandise subsequent to the effective date of this final decision.

In NY B88253, merchandise described as porcelain or "stoneware" dinnerware in patterned sets was classified under subheading 6912.00.39, HTSUSA, which provides for "ceramic household tableware, other than of porcelain or china, available in specified sets, in a pattern for which the aggregate value of the articles listed in additional U.S. Note 6(b) of Chapter 69 is over $38." In NY 813612, merchandise described as porcelain dinnerware in patterned sets was classified under subheading 6911.10.35, HTSUSA, which provides for "for ceramic household tableware, of porcelain or china, available in specified sets, in a pattern for which the aggregate value of the articles listed in additional U.S. Note 6(b) of Chapter 69 is not over $56." In reaching these conclusions, we reasoned that the maximum size limit set forth in Additional U.S. Note 6 to Chapter 69 which defines and sets forth parameters for tableware "available in specified sets" was a guideline rather than a rule. The holdings in these rulings contradict the holding of a prior Headquarters Ruling letter ("HQ") 955838, dated August 8, 1994. In HQ 955838, we held that the size of any article "available in specified sets" cannot exceed the maximum dimensions set forth in Additional U.S. Note 6 to Chapter 69.

As is noted above, two comments were received in response to the notice of proposed revocation. Both are opposed to the revocations. The first commenter believes that CBP's proposed interpretation is inconsistent with the plain language of Additional U.S. Note 6 to Chapter 69 and is contrary to accepted principles of statutory construction. The second commenter asserts that interpreting Additional U.S. Note 6 to Chapter 69 as a "flexible guideline rather than as an absolute, unbending rule" is more reasonable. The second commenter also states that "[f]or at least the past ten years, our client has received tariff treatment for such articles consistent with the determinations reflected in NY B88253 and NY 813612." Both com-

menters state that it has been CBP's longstanding practice to accept articles of larger or smaller than the maximums set forth in the note as long as the article was in the size nearest to that dimension to the pattern being qualified. These comments are addressed below.

First, we emphasize that HQ 955638 predates the NY ruling letters subject to revocation regarding the interpretation and application of Additional U.S. Note 6 to Chapter 69. All interested parties knew or should have known that HQ 955838 construed Additional U.S. Note 6 to Chapter 69 to establish an absolute dimensional limit. It has never been CBP's practice to allow articles exceeding the dimensional maximums in the note to qualify as being an article available in a specified set. The commenters' clients could have requested their own rulings regarding this issue and should not have relied upon the holdings of rulings issued to other importers. See the reference to the Mod Act above; see too 19 CFR Part 177.9 (c): "no other person should rely on the ruling letter or assume that the principles of that ruling will be applied in connection with any transaction other than the one described in the letter."

Second, we stress that our interpretation of Additional U.S. Note 6 to Chapter 69 is based on the plain language of the provision. In our view, the meaning of the note is plain and unambiguous. Many lines in the note take the following form:

> 12 plates of the size nearest to 15.3 cm in maximum dimension, sold or offered for sale,

This line refers to the 12 plates that must be sold or offered for sale that are nearest to, but do not exceed, 15.3 cm in maximum dimension. "Maximum" is taken at its plain meaning in the provision, clearly establishing the largest dimension that, for example, this size plate can have and be considered an article in a specified set. Failure to interpret "maximum" in this manner would result in the word being meaningless throughout the note.

Pursuant to 19 U.S.C. §1625(c)(1), CBP is revoking NY B88253 and NY 813612 as they pertain to the classification of ceramic articles "available in specified sets," and any other ruling not specifically identified, to reflect the proper classification of the merchandise. The merchandise in NY B88253 will be classified under subheading 6912.00.4810, HTSUSA, which provides for ceramic tableware, kitchenware . . . other than porcelain or china, other, other, other, pursuant to the analysis set forth in proposed HQ 967792 (*see* "Attachment A" to this document). The merchandise in NY 813612 will be classified under subheading 6911.10.8010, HTSUSA, which provides for ceramic tableware, kitchenware . . . of porcelain or china, tableware and kitchenware, other, other, other, other, pursuant to the analysis set forth in proposed HQ 967920 (*see* "Attachment B" to this document).

In accordance with 19 U.S.C. 1625(c), these rulings will become effective sixty days after its publication in the *Customs Bulletin*.

Dated: January 20, 2006

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967792
January 20, 2006
CLA–2 RR:CTF:TCM 967792 AML
CATEGORY: Classification
TARIFF NO.: 6912.00.4810

MR. DONALD F. WRIGHT
EXCEL IMPORTING CORPORATION
100 Andrews Road
Hicksville, NY 11801

RE: The tariff classification of stoneware dinnerware "available in specified sets"; NY B88253 revoked

DEAR MR. WRIGHT:

This is in reference to New York Ruling Letter ("NY") B88253, dated July 30, 1997, issued to you regarding the tariff classification of certain stoneware dinnerware "available in specified sets" under the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"). We have reconsidered the decision made in NY B88253 and have determined that the conclusions reached therein are incorrect. This letter sets forth the correct classification of the stoneware dinnerware "available in specified sets."

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186 (1993)), notice of the proposed revocation was published on December 7, 2005, in Vol. 39, No. 50 of the *Customs Bulletin*. Two comments were received in response to the notice.

FACTS:

We described the merchandise in NY B88253 as follows:

> The merchandise is stoneware dinnerware that is identified as in the patterns English Garden, Dorchester, Orchard and Cosmos. Previous information submitted indicates that the patterns are principally for household use and are "available in specified sets" in accordance with Chapter 69, additional U.S. Note 6(b) of the Harmonized Tariff Schedule of the United States, with an aggregate value of over $38.

We held that:

> The applicable subheading for the above stoneware dinnerware sets will be 6912.00.39, Harmonized Tariff Schedule of the United States (HTS), which provides for ceramic household tableware, other than of porcelain or china, available in specified sets, in a pattern for which the aggregate value of the articles listed in additional U.S. Note 6(b) of Chapter 69 is over $38. The duty rate will be 4.5 percent ad valorem.

In reaching that holding, we reasoned that:

> The term "of the size nearest to 15.3 cm in maximum dimension" in headnote 2(b) of chapter 69 means either more or less than the dimension specified and within a rather wide range. For example a salad plate may actually be up to 20.38 cm in diameter or as small as 10.22 cm in diameter.

On August 8, 1994, we issued Headquarters Ruling Letter ("HQ") 955838, which, in classifying a set of ceramic tableware, held that the maximum sizes set forth in Additional U.S. Note 6 to Chapter 69 could not be exceeded by any piece within the set.

ISSUE:

Whether any piece of table- or kitchenware "available in specified sets" may exceed the maximum size requirements of Additional U.S. Note 6 to chapter 69, HTSUS?

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 states, in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Additional U.S. Note 6 to Chapter 69 provides as follows:

> 6. For the purposes of headings 6911 and 6912:
>
> (a) The term "available in specified sets" embraces plates, cups, saucers and other articles principally used for preparing, serving or storing food or beverages, or food or beverage ingredients, which are sold or offered for sale in the same pattern, but no article is classifiable as being "available in specified sets" unless it is of a pattern in which at least the articles listed below in (b) of this note are sold or offered for sale.
>
> (b) If each of the following articles is sold or offered for sale in the same pattern, the classification hereunder in subheadings 6911.10.35, 6911.10.37, 6911.10.38, 6912.00.35 or 6912.00.39, of all articles of such pattern shall be governed by the aggregate value of the following articles in the quantities indicated, as determined by the appropriate customs officer under section 402 of the Tariff Act of 1930, as amended, whether or not such articles are imported in the same shipment:
>
> 12 plates of the size nearest to 26.7 cm in maximum dimension, sold or offered for sale,
>
> 12 plates of the size nearest to 15.3 cm in maximum dimension, sold or offered for sale,

12 tea cups and their saucers, sold or offered for sale,

12 soups of the size nearest to 17.8 cm in maximum dimension, sold or offered for sale,

12 fruits of the size nearest to 12.7 cm in maximum dimension, sold or offered for sale,

1 platter or chop dish of the size nearest to 38.1 cm in maximum dimension, sold or offered for sale,

1 open vegetable dish or bowl of the size nearest to 25.4 cm in maximum dimension, sold or offered for sale,

1 sugar of largest capacity, sold or offered for sale,

1 creamer of largest capacity, sold or offered for sale.

If either soups or fruits are not sold or offered for sale, 12 cereals of the size nearest to 15.3 cm in maximum dimension, sold or offered for sale, shall be substituted therefor.

The language of the additional U.S. note is unequivocal. The word "maximum" means "the greatest possible quantity or degree; the greatest quantity or degree reached or recorded; the upper limit of variation." See www.thefreedictionary.com. This plain understanding was employed in HQ 955838. In deciding whether certain articles could be substituted for others, we stated:

> Customs is of the opinion that the subject articles do not meet the necessary size requirements to be considered "available in specified sets". As the measurements in the note above indicate, a "cereal" cannot exceed 15.3 cm. Protestant's plate is 20.3 cm. It is too large to be substituted for a fruit plate or a cereal bowl. Therefore, the dinnerware is not considered "available for sale in specified sets". The protested pieces are classifiable in subheading 6912.00.48, HTSUS, as other ceramic tableware and kitchenware.

The crux of the holding above is that "maximum" is taken in its ordinary meaning and denotes the upper allowable limit that cannot be exceeded. Stated plainly, articles of table- and kitchenware "available in specified sets" cannot exceed the maximum dimensions set forth in Additional U.S. Note 6 to Chapter 69.

Given that NY B88253 explicitly stated that Additional U.S. Note 6 to Chapter 69 "means either more or less than the dimension specified and within a rather wide range," in contravention of the plain language of the note and HQ 955838, NY B88253 must be revoked.

The HTSUS provisions under consideration are as follows:

6912.00	Ceramic tableware, kitchenware, other household articles and toilet articles, other than of porcelain or china:
	Tableware and kitchenware:
6912.00.10	Of coarse-grained earthenware, or of coarse-grained stoneware; of fine-grained earthenware, whether or not decorated, having a reddish-colored body and a lustrous glaze which, on teapots, may be any color,

	but which, on other articles, must be mottled, streaked or solidly colored brown to black with metallic oxide or salt:
	* * *
	Other:
	Available in specified sets:
6912.00.35	In any pattern for which the aggregate value of the articles listed in additional U.S. note 6(b) of this chapter is not over $38
	Other:
6912.00.48	Other.

Given the statement in NY B88253 that the term "maximum" in Additional U.S. Note 6 to Chapter 69 means "more or less" and given that the size of some of the articles in the stoneware dinnerware apparently (NY B88253 was lost on September 11, 2001) exceeded the maximum dimension set forth in the tariff, the goods fall to be classified under subheading 6912.00.4810, HTSUSA. This comports with the holding in HQ 955838.

HOLDING:

The stoneware dinnerware is classified under subheading 6912.00.4810, HTSUSA which provides for ceramic tableware, kitchenware . . . other than porcelain or china, other, other, other. The general, column 1 duty rate is 9.8% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at *www.usitc.gov*.

EFFECT ON OTHER RULINGS:

NY B88253 is revoked. In accordance with 19 U.S.C. § 1625 (c)(2), this ruling will become effective sixty days after its publication in the *Customs Bulletin*.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

cc: National Commodity Specialist Division
NIS Bunin

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 967920
January 20, 2006
CLA–2 RR:CTF:TCM 967920 AML
CATEGORY: Classification
TARIFF NO.: 6911.10.8010

MR. CURT DEVLIN
ACTION INDUSTRIES, INC.
460 Nixon Rd.
Cheswick, PA 15024

RE: Tariff classification of porcelain dinnerware "available in specified sets"; NY 813612 revoked

DEAR MR. DEVLIN:

This is in reference to New York Ruling Letter ("NY") 813612, dated September 13, 1995, issued to you regarding the tariff classification of certain porcelain dinnerware "available in specified sets" under the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"). We have reconsidered the decision made in NY 813612 and have determined that the conclusions reached therein are incorrect. This letter sets forth the correct classification of the porcelain dinnerware "available in specified sets."

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057, 2186 (1993)), notice of the proposed revocation was published on December 7, 2005, in Vol. 39, No. 50 of the *Customs Bulletin*. Two comments were received in response to the notice.

FACTS:

We described the merchandise in NY 813612 as follows:

> The merchandise at issue is porcelain dinnerware that is identified as in the Joy Of Christmas pattern, Item Number 17637. The information submitted indicates that the pattern is principally for household use and is "available in specified sets" in accordance with Chapter 69, additional U.S. Note 6(b) of the Harmonized Tariff Schedule of the United States.

After considering the cost per item information you provided, we held that:

> The applicable subheading for the Joy of Christmas porcelain dinnerware set will be 6911.10.35, Harmonized Tariff Schedule of the United States (HTS), which provides for ceramic household tableware, of porcelain or china, available in specified sets, in a pattern for which the aggregate value of the articles listed in additional U.S. Note 6(b) of Chapter 69 is not over $56. The duty rate will be 26 percent ad valorem.

Included in your submission were measurements, in inches, of the various articles that comprised the specified set. The relevant measurements and our conversion from inches to centimeters (multiplying the number of inches by 2.54) are as follows:

10 1/2″ Dinner Plate	26.7 centimeters
7 1/2″ Salad Plate	19.1 centimeters
8″ Soup/Cereal	20.32 centimeters
15″ Oval Platter	38.1 centimeters
10″ Oval Shape Veg. Dish	25.4 centimeters

On August 8, 1994, we issued Headquarters Ruling Letter ("HQ") 955838, which, in classifying a set of ceramic tableware, held that the maximum sizes set forth in Additional U.S. Note 6 to Chapter 69 could not be exceeded by any piece within the set.

ISSUE:

Whether any piece of table- or kitchenware "available in specified sets" may exceed the maximum size requirements of Additional U.S. Note 6 to chapter 69, HTSUS?

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 states, in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Additional U.S. Note 6 to Chapter 69 provides as follows:

> 6. For the purposes of headings 6911 and 6912:
>
> (a) The term "available in specified sets" embraces plates, cups, saucers and other articles principally used for preparing, serving or storing food or beverages, or food or beverage ingredients, which are sold or offered for sale in the same pattern, but no article is classifiable as being "available in specified sets" unless it is of a pattern in which at least the articles listed below in (b) of this note are sold or offered for sale.
>
> (b) If each of the following articles is sold or offered for sale in the same pattern, the classification hereunder in subheadings 6911.10.35, 6911.10.37, 6911.10.38, 6912.00.35 or 6912.00.39, of all articles of such pattern shall be governed by the aggregate value of the following articles in the quantities indicated, as determined by the appropriate customs officer under section 402 of the Tariff Act of 1930, as amended, whether or not such articles are imported in the same shipment:
>
> 12 plates of the size nearest to 26.7 cm in maximum dimension, sold or offered for sale,
> 12 plates of the size nearest to 15.3 cm in maximum dimension, sold or offered for sale,
> 12 tea cups and their saucers, sold or offered for sale,
> 12 soups of the size nearest to 17.8 cm in maximum dimension, sold or offered for sale,
> 12 fruits of the size nearest to 12.7 cm in maximum dimension, sold or offered for sale,
> 1 platter or chop dish of the size nearest to 38.1 cm in maximum dimension, sold or offered for sale,
> 1 open vegetable dish or bowl of the size nearest to 25.4 cm in maximum dimension, sold or offered for sale,
> 1 sugar of largest capacity, sold or offered for sale,
> 1 creamer of largest capacity, sold or offered for sale.

> If either soups or fruits are not sold or offered for sale, 12 cereals of the size nearest to 15.3 cm in maximum dimension, sold or offered for sale, shall be substituted therefor.

The language of the additional U.S. note is unequivocal. The word "maximum" means "the greatest possible quantity or degree; the greatest quantity or degree reached or recorded; the upper limit of variation." See www.thefreedictionary.com. This plain understanding was employed in HQ 955838. In deciding whether certain articles could be substituted for others, we stated:

> Customs is of the opinion that the subject articles do not meet the necessary size requirements to be considered "available in specified sets". As the measurements in the note above indicate, a "cereal" cannot exceed 15.3 cm. Protestant's plate is 20.3 cm. It is too large to be substituted for a fruit plate or a cereal bowl. Therefore, the dinnerware is not considered "available for sale in specified sets". The protested pieces are classifiable in subheading 6912.00.48, HTSUS, as other ceramic tableware and kitchenware.

The crux of the holding above is that "maximum" is taken in its ordinary meaning and denotes the upper allowable limit that cannot be exceeded. Stated plainly, articles of table- and kitchenware "available in specified sets" cannot exceed the maximum dimensions set forth in Additional U.S. Note 6 to Chapter 69.

We did not apply the dimension standards in NY 813612, in contravention of the plain language of the Additional U.S. Note 6 and HQ 955838. Both the salad plates which measure 19.1 cm and the soup/cereal bowls which measure 20.32 cm exceed the 15.3 and 17.8 cm size limits set forth in the Additional U.S. Note 6. Thus, NY 813612 must be revoked.

The HTSUS provisions under consideration are as follows:

6911	Tableware, kitchenware, other household articles and toilet articles, of porcelain or china:
6911.10	Tableware and kitchenware:
	Other:
	Other:
	Available in specified sets:
6911.10.35	In any pattern for which the aggregate value of the articles listed in additional U.S. note 6(b) of this chapter is not over $56
	Other:
6911.10.80	Other.

Given the size of some of the articles in the porcelain dinnerware, which exceed the maximum dimensions set forth in the tariff, the goods fall to be classified under subheading, HTSUSA. This comports with the holding in HQ 955838.

HOLDING:

The porcelain dinnerware is classified under subheading 6911.10.8010, HTSUSA which provides for ceramic tableware, kitchenware . . . of porcelain

or china, tableware and kitchenware, other, other, other, other. The general, column 1 duty rate is 20.8% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at *www.usitc.gov*.

EFFECT ON OTHER RULINGS:

NY 813612 is revoked. In accordance with 19 U.S.C. §1625 (c)(2), this ruling will become effective sixty days after its publication in the *Customs Bulletin*.

Gail A. Hamill for MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

cc: National Commodity Specialist Division
NIS Bunin

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Slip Op. 06–15

HYNIX SEMICONDUCTOR AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg,
Senior Judge
Consol. Court No. 03–00856

OPINION

[Hynix's motion for summary judgment granted. Customs' cross-motion for summary judgment is denied.]

Dated: January 26, 2006

Willkie Farr & Gallagher (*Miriam A. Bishop*) for Plaintiff Hynix Semiconductor America, Inc.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office; Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*James A. Curley*), for Defendant United States.

GOLDBERG, Senior Judge: In this action reviewing a denial of a protest under 19 U.S.C. § 1514, Plaintiff Hynix Semiconductor America, Inc. (**"Hynix"**) moves the court, under USCIT R. 56, to enter summary judgment in its favor, and to order the Defendant U.S. Customs and Border Protection (**"Customs"**) to reliquidate certain entries to correct an error made in liquidating those entries based on incorrect instructions issued by the U.S. Department of Commerce (**"Commerce"**). Customs also moves for summary judgment, contending that it properly denied Hynix's reliquidation request, and that therefore this Court should dismiss the case. *See* Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Its Cross-Motion for Summary Judgment (**"Customs Br."**).

The Court concludes that a Commerce employee made a "clerical error" and "mistake of fact" when transferring data from a computer printout into liquidation instructions, after which Customs followed the erroneous instructions and liquidated the goods at an incorrect

rate, resulting in an adverse duty rate applied to Hynix's entries. Because such an error was correctable under 19 U.S.C. § 1520(c) as a mistake of fact or clerical error not amounting to an error in the construction of a law, and because the failure to file a protest within ninety days of the liquidation of the entries is without legal consequence in this context, the Court grants Hynix's motion for summary judgment and denies Customs' cross-motion for the same.

I. *BACKGROUND*

This consolidated action[1] concerns 486 entries (**"the Entries"**) of Dynamic Random Access Memory Semiconductors (**"DRAMS"**) manufactured in the Republic of Korea (**"Korea"**) and exported to the United States. The Entries arrived in the Port of San Francisco during a period from May 1, 1998 to April 30, 1999, and were subject to Commerce's sixth administrative review of an antidumping duty order then in place.[2]

Commerce, in its sixth administrative review, calculated two types of antidumping rates: (1) a single *weighted-average dumping margin* for each producer/exporter, which was calculated using all U.S. sales by that producer/exporter, and (2) an *importer-specific assessment rate*, which was calculated using only U.S. sales by that same producer/exporter to certain specific importers. *See Final Results*, 65 Fed. Reg. at 68978. Commerce determined that the weighted-average dumping margin for producer/exporter Hyundai Electronics Industries Co., Ltd. (**"Hyundai Electronics"**) was 2.30 percent. *Id.* Commerce also calculated an importer-specific rate of 1.57 percent for Hyundai Electronics America, Inc. (**"Hyundai Electronics America"**).[3] *See* Tr. of Paige Rivas Dep. (**"Rivas Dep."**) 32–33. The actual importer-specific rate was not published in the *Federal Register*, but the *Final Results* apprised readers of its existence:

> The Department shall determine, and the Customs Service shall assess, antidumping duties on all appropriate entries. The Department will issue appraisement instructions directly to the Customs Service. Where the importer-specific assessment rate is above *de minimis*, we will instruct Customs to as-

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[1] The original Case No. 03–00856 involved 468 DRAMS entries. On December 2, 2004, and pursuant to USCIT R. 42(a), the parties consented to the consolidation of a subsequent case, filed in August 2004, which involved additional 18 DRAMS entries.

[2] *See Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea*, 65 Fed. Reg. 68976 (Dep't Commerce Nov. 15, 2000) (final results of administrative review) (***"Final Results"***).

[3] In October 1999, Hyundai Electronics acquired LG Semicon Co., Ltd., another Korean DRAMS manufacturer. The resultant entity was renamed Hynix Semiconductor, Inc. Hyundai Electronics America, which was a wholly owned subsidiary of the former Hyundai Electronics, was similarly designated Hynix Semiconductor America, Inc.

> sess antidumping duties on that importer's entries of subject merchandise.
>
> These final results of review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by this review. For duty-assessment purposes, we calculated importer-specific assessment rates by aggregating the dumping margins calculated for all U.S. sales to each importer and dividing this amount by the total estimated entered value reported for those sales.

Final Results, 65 Fed. Reg. at 68978.

Both the weighted-average dumping margin for Hyundai Electronics and the importer-specific assessment rate for Hyundai Electronics America were derived from the data compiled during the administrative review, as entered into a specially designed computer program using Statistical Application Software. *See* Hynix's Statement of Material Facts Not in Dispute ¶ 9 (**"Hynix's Statement of Facts"**); *see also* Defendant's Response to Plaintiff's Statement of Material Facts (**"Customs' Statement of Facts"**) ¶ 9 (admitting the same). In Commerce, the computer program is known as the "SAS Program." *See* Rivas Dep. 15:9-16. The SAS Program produces a computer printout (**"SAS Printout"**) that lists the duty rates for all relevant exporters and producers, as well as the importer-specific rates where appropriate. *See* Hynix's Statement of Facts ¶ 10. For the sixth administrative review, both the weighted-average dumping margin for Hyundai Electronics and the importer-specific assessment rate for Hyundai Electronics America appeared on the SAS Printout, as well as on the computer display for the SAS Program, but on different pages. *See* Rivas Dep. 31:14–33:23; *see also* Hynix's Statement of Facts ¶ 12; Customs' Statement of Facts ¶ 12 (admitting the same).

Notwithstanding the routine unfolding of events up to that point, Commerce's liquidation instructions, prepared by Ms. Paige Rivas (**"Rivas"**), instructed Customs as follows: "For all shipments of DRAMS from Korea Produced by Hyundai, *and imported by Hyundai Electronics America, Inc.*, and entered or withdrawn from warehouse for consumption during the period 05/01/1998 through 04/30/1999, assess an antidumping liability of 2.30 percent of the entered value." Commerce Dep't Message 1260205 (Sept. 17, 2001) (Ex. 2 of Rivas Dep.) (emphasis added). Customs liquidated the Entries at 2.30 percent in a manner consistent with Commerce's instructions, which had erroneously indicated the weighted-average dumping margin instead of the importer-specific rate that (1) was noted in the *Final Results*, (2) resulted from the SAS Program, and (3) appeared on the SAS Printout.

The erroneous instructions resulted from Rivas' incorrect transfer of data from the SAS Printout to the liquidation instructions she

prepared for Customs. *See* Rivas Dep. 32:7–34:12. Rivas consulted the SAS printout, but failed to notice the importer-specific rate for Hyundai Electronics America. *Id.* 34:3–9. Indeed, Rivas does not recall if she examined that page at all. *Id.* 34:10–12. Neither does Rivas recall if she consulted the *Final Results* published in the *Federal Register*, which would have referenced the importer-specific rate. *Id.* 35:9–11.

Some time after Customs liquidated the Entries, Hynix's counsel contacted Rivas to point out that the liquidation instructions mistakenly directed Customs to assess a 2.30 percent dumping margin for goods imported by a company with an importer-specific rate of 1.57 percent. *Id.* 17:14–20:17. After that conversation, Rivas reexamined the SAS Printout and determined that the results of the SAS Program contemplated two distinct rates. *Id.* Rivas was unaware of the distinction between weighted-average dumping margins and importer-specific rates, so she undertook some general research in the dumping manual and other source materials. *Id.*

After realizing her error, Rivas corrected and replaced the previous liquidation instructions on March 15, 2002. Hynix's Statement of Facts ¶ 26; Customs' Statement of Facts ¶ 26 (admitting the same). The relevant portions of the second set of liquidation instructions provided as follows:

> RE: Correction and Replacement of MSG. 1260205 Re Liquidation Instructions For DRAMS from Korea Produced by Hyundai Electronics Industries (A–580–812–02) . . .
>
> 1. This is a correction of Message 1260205 on 09/17/2001. The assessment rate in Paragraph 1 of the above-referenced message is incorrect. The correct message, with the correct assessment rate, is in Paragraph 2.
> 2. For all shipments of DRAMS from Korea Produced by Hyundai, and imported by Hyundai Electronics America, Inc., and entered or withdrawn from warehouse for consumption during the period 05/01/1998 through 04/30/1999, assess an antidumping liability of 1.57 percent of the entered value.

Commerce Dep't Message 2074203 (Mar. 22, 2002) (Ex. 3 of Rivas Dep.).

After Commerce issued the corrected liquidation instructions, Hynix filed protests under 19 U.S.C. § 1514, importuning Customs (1) to correct the error made in assessing antidumping duties on Hynix, and (2) to apply the correct importer-specific assessment rate as required by the *Final Results*. *See* Hynix's Statement of Facts ¶ 27; Customs' Statement of Facts ¶ 28. Customs granted Plaintiff's protests and reliquidated at 1.57 percent any of Hynix's entries

whose liquidation date fell within ninety days of the date of protest.[4] *See* Hynix's Statement of Facts ¶ 28; Customs' Statement of Facts ¶ 28. However, since the Entries were liquidated more than 90 days before the protest, Hynix could not file a protest with respect to the Entries, and filed reliquidation requests under 19 U.S.C. § 1520(c)[5] for the two sets of the Entries on April 22, 2002 and June 27, 2002, respectively. *See* Hynix's Statement of Facts ¶ 29.

On June 18, 2002 and September 25, 2002, Customs denied those applications on the grounds that no clerical error, mistake of fact or inadvertence occurred on the part of Customs, and therefore relief under 19 U.S.C. § 1520(c) was unavailable. *See* Customs Br. at 6–7. Hynix filed protests under 19 U.S.C. § 1514 contesting the denial of its reliquidation requests on September 3, 2002, and November 27, 2002, respectively. Hynix's Statement of Facts ¶ 30; Customs' Statement of Facts ¶ 30. In response, Customs reiterated its contention that reliquidation was inappropriate because Hynix "has not shown with documentary evidence, nor is it manifest from the record that a clerical error, mistake of fact, or other inadvertence occurred in the entry, liquidation, or other customs transaction . . . ." HQ 229808 at 6 (Apr. 30, 2003), *available at* 2003 U.S. CUSTOM HQ LEXIS 215. Customs also stated that its role in assessing the 2.30 percent antidumping duty was merely ministerial, and claimed it was merely following instructions, and therefore could not be said to have committed an error. *Id.* at 4–5. Ultimately, Customs denied both protests. *See* Hynix's Statement of Facts ¶ 30; Customs' Statement of Facts ¶ 30 (admitting the same). Hynix commenced proceedings in this Court on November 24, 2003.

II. *JURISDICTION*

"Without jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (*quoting Ex parte McCardle*, 74 U.S. 506, 514 (1868)). The jurisdiction of the U.S. Court of International Trade is laid out in 28 U.S.C. §§ 1581–83. 28 U.S.C. § 1581(a) grants the Court exclusive jurisdiction to hear "any civil action commenced to contest the denial of a protest, in whole or in part, under [19 U.S.C. § 1515]." 28 U.S.C. § 1581(a) (1999). 19 U.S.C. § 1515 outlines the procedures Customs

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[4] Prior to a 2004 amendment extending the statute of limitations to 180 days, 19 U.S.C. § 1514 allowed an importer ninety days to protest one of seven types of "decision[s] of the Customs Service. . . ." *See* 19 U.S.C. § 1514 (1999). Under 19 U.S.C. § 1520(c), however, an importer benefits from a longer one-year statute of limitations to file a reliquidation request to correct the following three types of errors: clerical errors, mistakes of fact, and other inadvertences. *See id.* § 1520(c).

[5] In 2004, Congress repealed 19 U.S.C. § 1520(c). *See* Pub. L. 108–429, title II, § 2105, 118 Stat. 3598 (2004). Since, however, the Entries arrived prior to the repeal, the Court notes that the former 19 U.S.C. § 1520(c) governs this case.

must follow in ruling on a protest filed pursuant to 19 U.S.C. § 1514. Hynix, as noted *supra*, filed such a protest to challenge Customs' earlier denial of its 19 U.S.C. § 1520(c) reliquidation request. That protest was properly initiated under 19 U.S.C. § 1514, which specifically enumerates "the refusal to reliquidate an entry under section 1520(c)" as a protestable "decision of the Customs Service." 19 U.S.C. § 1514 (1999).

Since Hynix now contests Customs' denial of its protest of Customs' earlier denial of its reliquidation request, the Court has 19 U.S.C. § 1581(a) jurisdiction over this case.[6]

III. *STANDARD OF REVIEW*

"[S]ummary judgment is proper 'if the pleadings [and the discovery materials] show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (*quoting* Fed. R. Civ. P. 56(c)).[7] "In ruling on cross-motions for summary judgment, the court must determine if there exist any genuine issues of material fact and, if there are none, decide whether either party has demonstrated its entitlement to judgment as a matter of law." *Am. Motorists Ins. Co. v. United States*, 5 CIT 33, 36 (1983).

Customs' denial of Hynix's protests is subject to the Court's de novo review under 28 U.S.C. § 2640(a)(1). *See, e.g., Chevron Chem. Co. v. United States*, 23 CIT 500, 500, 59 F. Supp. 2d 1361, 1362–63 (1999).

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[6] This case is distinguishable from the recent line of cases that have found residual jurisdiction, under 28 U.S.C. § 1581(i), to hear actions relating to liquidation instructions that were at odds with Commerce determinations. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297 (Fed. Cir. 2004); *Mitsubishi Elecs. Am. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994). Implicit in the exercise of residual jurisdiction is the absence of an alternative remedy under 28 U.S.C. § 1581(a)–(h). *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003). In this case, the plaintiff availed itself of the administrative procedures that were available to it by requesting reliquidation under 19 U.S.C. § 1520(c). The *Mitsubishi* and *Shinyei* plaintiffs, however, had no recourse to reliquidation because there was no "clerical error, mistake of fact, or other inadvertence" at issue in those cases. Neither did those plaintiffs have access to other modes of redress, such as 19 U.S.C. § 1514 or the reviewable determinations listed in 19 U.S.C. § 1516a(a)(2)(B), which would have triggered subject matter jurisdiction under 28 U.S.C. § 1581(c). Because those plaintiffs had no administrative remedies that could lead to judicial review in this Court, they could invoke residual jurisdiction. Conversely, in a case involving a transparent clerical error that an importer can correct under 19 U.S.C. § 1520(c), residual jurisdiction is unavailable.

[7] "When the Court's rules are materially the same as the [Federal Rules of Civil Procedure ("FRCP")], the Court has found it appropriate to consider decisions and commentary on the FRCP in interpreting its own rules." *Former Employees of Tyco Elec. v. United States Dep't of Labor*, 27 CIT ____, ____, 259 F. Supp. 2d 1246, 1251 (2003).

IV. *DISCUSSION*

This case concerns the application of Section 520(c) of the Tariff Act of 1930, codified at 19 U.S.C. § 1520(c). The relevant portion of that statute reads as follows:

> (c) Reliquidation of entry or reconciliation
>
> Notwithstanding a valid protest was not filed, the Customs Service may . . . reliquidate an entry or reconciliation to correct–
>
> (1) *a clerical error, mistake of fact, or other inadvertence*, whether or not resulting from orcontained in electronic transmission, *not amounting to an error in the construction of a law*, adverse to the importer and manifest from the record or established by documentary evidence, *in any* entry, *liquidation*, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction. . . .

19 U.S.C. § 1520(c)(1) (1999) (emphasis added).

Hynix claims it filed a proper reliquidation request because both Customs and Commerce made correctable "mistake[s] of fact" that did not amount to "mistake[s] in the construction of a law. . . ." *Id.* Customs' rebuttal is fourfold. First, Customs claims it committed no error at all. Second, Customs argues that Commerce errors are per se excluded from the ambit of 19 U.S.C. § 1520(c). Third, Customs argues Commerce's error, if any, was a "mistake in the construction of a law" and irremediable under 19 U.S.C. § 1520(c). Customs' fourth argument–to which the Court turns as a preliminary matter-is that Hynix is prevented from invoking 19 U.S.C. § 1520(c) because it failed to execute "due diligence," Customs Br. at 20, by not utilizing the available protest proceedings under 19 U.S.C. § 1514.

A. The Effect of Hynix's Failure to Bring a Timely Protest Action Under 19 U.S.C. § 1514

The Entries were liquidated over a period spanning from December 21, 2001 to February 15, 2002. Under 19 U.S.C. § 1514 as then in effect, an importer had ninety days[8] from the date of liquidation to file a protest challenging a "decision of the Customs Service. . . ."[9]

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[8] A protest was timely if it was filed with Customs "within ninety days but not before . . . notice of liquidation or reliquidation. . . ." 19 U.S.C. § 1514(c)(3) (1999).

[9] Prior to the 2004 amendment, 19 U.S.C. § 1514 provided in pertinent part as follows:

> (a) Finality of decisions; return of papers
>
> [Subject to the listed exceptions, including 19 U.S.C. § 1520(c),] decisions of the Customs Service, including the legality of all orders and findings entering into the same, as to–

Therefore, with respect to the earliest of the Entries, Hynix had ninety days–or until March 21, 2002–to file a timely 19 U.S.C. § 1514 protest.

When Commerce issued new liquidation instructions on March 15, 2002, Hynix immediately filed protests. Customs granted the protests with respect to those entries that occurred in the period extending from ninety days before the filing until the filing date itself. Customs denied the protest, as time barred, with respect to the earlier entries. Then Hynix, on April 22, 2002 (covering the original 468 entries) and June 27, 2002 (covering the additional 18 entries), filed the 19 U.S.C. § 1520(c) reliquidation requests with which this case is concerned. The Entries were liquidated over a period spanning from December 21, 2001 to February 15, 2002. Because Hynix filed its reliquidation requests within one year from the "date of liquidation or exaction," 19 U.S.C. § 1520(c) (1999), its requests, unlike its protests, were timely.

Customs argues that Hynix "failed here to exercise due diligence by filing timely protests against liquidation of the entries in issue, and relied upon § 1520(c)(1) as a substitute for a protest under § 1514." Customs Br. at 20. The general rule is that no provisions of 19 U.S.C. § 1520(c) can be employed to excuse the failure to satisfy the requirements of 19 U.S.C. § 1514. *See Fujitsu Compound Semiconductor, Inc. v. United States*, 363 F.3d 1230, 1234–35 (Fed. Cir. 2004); *ITT Corp. v. United States*, 24 F.3d 1384, 1387 n.4 (Fed. Cir. 1994). Absent the limited exceptions enumerated in 19 U.S.C. § 1514 (including reliquidations based on clerical errors, mistakes of fact, and other inadvertences under 19 U.S.C. § 1520(c)), unless a valid protest is filed within ninety days from the date of liquidation, the liquidation of certain imported merchandise becomes final and conclusive on all persons. *Fujitsu*, 363 F.3d at 1234–35; *Degussa Can. Ltd. v. United States*, 19 CIT 864, 867, 889 F. Supp. 1543, 1547 (1995); *see also* 19 U.S.C. § 1514(c)(3) (1999).

If a litigant fails to protest, within ninety days, a Customs decision as to one of the categories of decisions enumerated in 19 U.S.C. § 1514, that litigant will, in most cases, be unable to raise the claim

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(1) the appraised value of merchandise;
(2) the classification and rate and amount of duties chargeable;
(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

. . .

(5) the liquidation or reliquidation of an entry,

. . .

(7) the refusal to reliquidate an entry under section 1520(c) of this title;

shall be final and conclusive upon all persons . . . unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade. . . .

19 U.S.C. § 1514(a) (1999).

in a reliquidation request. However, the bipartite statutory scheme that Congress created explicitly contemplates 19 U.S.C. § 1520(c) as an exception to the "general rule" discussed in *Fujitsu* and *ITT Corp.* *See* 19 U.S.C. § 1514(a) (1999) (declaring all Customs decisions to be final "[e]xcept as provided in" *inter alia* "section 1520 of this title").

There is no independent requirement that a plaintiff engage in "due diligence," Customs Br. at 20, by checking for mistakes and errors that result in liquidation of merchandise. Congress provided a longer statute of limitations for one set of challengeable administrative acts, and the mere existence of a shorter statute of limitations as to another set of conceptually related challengeable acts does not create any obligation to exercise a special "due diligence" and care. If 19 U.S.C. § 1520(c) provides a mode of redress to correct the errors alleged by Hynix, then Hynix need only satisfy the requirements of that statute, and validly invoke the protest and judicial review procedures of 19 U.S.C. § 1514 to challenge Customs' refusal to reliquidate under 19 U.S.C. § 1520(c) to obtain its relief.

B. Application of 19 U.S.C. § 1520(c) to the Entries

Under 19 U.S.C. § 1520(c), an importer may not obtain reliquidation of an entry based on any "error in the construction of the law," and must instead obtain redress under 19 U.S.C. § 1514. Courts have interpreted the phrase "error in the construction of a law" as interchangeable with its more familiar analogue, "mistake of law." *See Brother Int'l Corp. v. United States*, 29 CIT ___, ___ n.10, 368 F. Supp. 2d 1345, 1351 (2005) (*citing Ford Motor Co. v. United States*, 157 F.3d 849, 859 (Fed. Cir. 1998)).

Sometimes, an error that qualifies as a "clerical error, mistake of fact, or other inadvertence" may not justify reliquidation because it is also an error of law: "the statute contemplates that some errors that are prima facie correctable will also be 'errors in the construction of a law.' "[10] *Ford Motor Co.*, 157 F.3d at 857 (*quoting* 19 U.S.C. § 1520(c)).

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[10] *But see Hambro Auto. Corp. v. United States*, 66 C.C.P.A. 113, 118, C.A.D. 1231, 603 F.2d 850, 853 (1979) ("A mistake of fact is any mistake except a mistake of law.") (*quoting C.J. Tower & Sons of Buffalo, Inc. v. United States*, 68 Cust. Ct. 17, 22, 336 F. Supp. 1395, 1399 (1972), *aff'd*, 61 C.C.P.A. 90, C.A.D. 1129, 499 F.2d 1277 (1974)). Obviously, *Ford Motor Co.* and *Hambro* are in conflict. If a mistake of fact is defined as any mistake other than a mistake of law, it would be impossible that, as *Ford Motor Co.* suggests, some mistakes of fact are also mistakes of law. *But see Brother Int'l*, 29 CIT at ____, 368 F. Supp. 2d at 1351 (relying on *Ford Motor Co.* to find that importer made a mistake of fact that was also an error in the construction of the law and outside the scope of 19 U.S.C. § 1520(c)).

Yet another difficulty arises from *Hambro*'s categorization of all mistakes as either mistakes of law or mistakes of fact. If a "clerical error" qualifies as neither a mistake of law nor a mistake of fact, it may not, under the *Hambro* framework, be considered a mistake at all. It stretches the imagination to conjure a clerical error that is not a mistake, but such a scenario is possible according to *Hambro*. This problem results from the *Hambro* court's use of the phrase "any mistake," which directs litigants' attention away from the three defined statutory categories laid out in 19 U.S.C. § 1520(c). Instead, the Court reads *Ford Motor*

A mistake of law occurs "where the facts are known but their legal consequences are not, or are believed to be different than they really are." *Century Imp's, Inc. v. United States*, 205 F.3d 1308, 1313 (Fed. Cir. 2000). A mistake of fact occurs "where either (1) the facts exist, but are unknown, or (2) the facts do not exist as they are believed to [exist]." *Hambro*, 66 C.C.P.A. at 119, 603 F.2d at 855; *see also G&R Produce Co. v. United States*, 381 F.3d 1328, 1333 (Fed. Cir. 2004).

In attempting to refine the distinction between types of mistakes under 19 U.S.C. § 1520(c), this court has distinguished between "decisional mistakes," which must be challenged under 19 U.S.C. § 1514, and "ignorant mistakes," which are remediable under 19 U.S.C. § 1520(c). *See G&R Produce Co. v. United States*, 27 CIT ___, ___, 281 F. Supp. 2d 1323, 1331 (2003); *Prosegur, Inc. v. United States*, 25 CIT 364, 370, 140 F. Supp. 2d 1370, 1378 (2001); *Universal Coops., Inc. v. United States*, 13 CIT 516, 518, 715 F. Supp. 1113, 1114 (1989). Decisional mistakes are mistakes of law and occur when "a party [makes] the wrong choice between two known, alternative sets of facts." *Universal Coops.*, 13 CIT at 518, 715 F. Supp. at 1114. On the other hand, an ignorant mistake occurs where "a party is unaware of the existence of the correct alternative set of facts." *Id.* "In order for the goods to be reliquidated under 1520(c)(1), the alleged mistake of fact must be an ignorant mistake." *Prosegur*, 25 CIT at 370, 140 F. Supp. 2d at 1378.

The statute also contains a materiality requirement. *See* 19 U.S.C. § 1520(c) (1999) (requiring that an error must be "adverse to the importer" in order to justify reliquidation under 19 U.S.C. § 1520(c)). In the classification context, for example, courts have addressed the materiality requirement extensively. *See, e.g., Degussa Can. Ltd. v. United States*, 87 F.3d 1301, 1304 (Fed. Cir. 1996) ("[A] mistake of fact . . . is a factual error that, if the correct fact had been known, *would have resulted in a different classification*.") (emphasis added); *Xerox Corp. v. United States*, Slip Op. 04–113, at 10, 2004 Ct. Int'l Trade LEXIS 112, at *14 (CIT Sept. 8, 2004). The unambiguous language of the statute requires that courts apply the materiality requirement to all 19 U.S.C. § 1520(c) cases, even those in contexts where, as in this case, the case law is less developed.

Hynix alleges two different mistakes of fact that, it argues, are correctable under 19 U.S.C. § 1520(c). First, Hynix claims *Customs* made a mistake of fact by liquidating the Entries at the incorrect rate. *See* Hynix's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment at 20. Second, it contends *Commerce* made a mistake when Rivas incorrectly transferred

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Co. as overshadowing *Hambro*'s binary taxonomy of "mistakes." After *Ford Motor Co.*, a court is charged with two inquiries: first, it decides whether the alleged error falls into one of the three prima facie categories of correctable errors; and second, it decides whether a prima facie correctable error is nevertheless uncorrectable because it is also a mistake of law.

data from the SAS Program and the SAS Printout to the template liquidation instructions. *See* Plaintiff's Brief in Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Cross-Motion for Summary Judgment (**"Hynix Reply"**) at 13–14. Customs, on the other hand, argues in response that (1) Customs itself made no cognizable "mistake of fact" or correctable error; and (2) Rivas' failure to take into account the importer-specific assessment rate applicable to Hyundai Electronics America amounts to "an error in the construction of a law," which would foreclose reliquidation relief under 19 U.S.C. § 1520(c). *See* Customs Br. at 9–16.

1. Customs' Liquidation of the Entries at an Incorrect Rate Was Not a Correctable Mistake of Fact Because It Fails the Materiality Test

Hynix's contention that Customs committed a mistake of fact because it followed erroneous instructions from Commerce fails to take into account the materiality requirement, and therefore betrays a misunderstanding of the "ignorant mistake" case law. As discussed *supra*, an ignorant mistake occurs when "a party is unaware of the existence of the correct alternative set of facts." *Universal Coops.*, 13 CIT at 518, 715 F. Supp. at 1114. Equally critical, however, is the requirement that the ignorant party would have acted differently had it known the truth about the mistaken facts. *See Degussa*, 87 F.3d at 1304.

Thus, in *Xerox Corp.*, the court found a mistake of fact where an employee of an importer, who was responsible for entering merchandise, mischaracterized certain entries as "photocopying apparatus" (subheading 9009.12.00 of the Harmonized Tariff Schedule of the United States (**"HTSUS"**)) instead of "laser printers" (subheading 8471.60.6100 of the HTSUS), which were entitled to a lower tariff rate. *Xerox Corp.*, Slip. Op. 04–113, at 4, 2004 Ct. Int'l Trade LEXIS 112, at *4–*5. In reality, the merchandise "could be connected to a computer, receive data, and print it out and . . . could not make a photocopy," and was therefore properly categorized as "laser printers." *Id.* at 5, 2004 Ct. Int'l Trade LEXIS 112, at *8. The employee, however, was unfamiliar with the merchandise and relied on erroneous invoice descriptions. *Id.* The court found that since the employee "had the mistaken belief that the merchandise was other than what it was, it is clear that [his] reliance on inaccurate merchandise descriptions on the invoices constitutes a mistake of fact." *Id.* at 11, 2004 Ct. Int'l Trade LEXIS 112, at *16.

Similarly, in *G&R Produce*, the U.S. Court of Appeals for the Federal Circuit (**"Federal Circuit"**) found a mistake of fact when a Customs official, "as a result of not knowing the correct botanical designation for Persian limes . . . incorrectly believed that 'Citrus aurantifolia' encompassed all limes and therefore, misclassified

[plaintiff's] goods under [the HTSUS]." *G&R Produce*, 381 F.3d at 1333. The correct designation of Persian limes was "Citrus latifolia" and corresponded to a lower rate under the HTSUS. The relevant "fact" in *G&R Produce* was that the category of "Citrus latifolia" existed. The Customs agent was ignorant of that fact, and indeed believed another fact-that "Citrus aurantifolia" applied to all limes-to be true. *Cf. C.J. Tower & Sons*, 61 C.C.P.A. at 96, 499 F.2d at 1282 (broker's ignorance of duty-free designation "emergency war material" was a mistake of fact). The Federal Circuit found that a mistake of fact, not amounting to a mistake in the construction of a law, existed. *See G&R Produce*, 381 F.3d at 1333.

Both *G&R Produce* and *Xerox Corp.* involved mistaken perceptions of facts that were constitutive of the classification process performed by Customs. In both cases, the mistakes related to vital components of classification: in *G&R Produce*, a mistake as to what categories existed, and in *Xerox Corp.*, a mistake as to the relevant properties of merchandise on which basis the classification depended. In this case, however, Hynix alleges the mistake is Customs' failure to take into account potentially relevant information that, while important, is unlikely to have affected Customs' action.

Hynix overstates Customs' discretion when acting pursuant to Commerce's instructions. When Customs follows liquidation instructions issued by Commerce subsequent to an administrative review, it is executing a purely ministerial duty over which it possesses no discretion. *See Mitsubishi*, 44 F.3d at 977 ("Customs merely follows Commerce's instructions in assessing and collecting duties. . . . Customs cannot modify . . . [Commerce's] determinations, their underlying facts, or their enforcement.") (quotation marks omitted); *cf.* 19 C.F.R. § 351.212 (2005) ("The Secretary [of Commerce] then will instruct the Customs Service to assess antidumping duties by applying the assessment rate to the entered value of the merchandise."); 19 U.S.C. § 1675(a)(3)(B) (1999) ("If [Commerce] orders any liquidation of entries pursuant to [an administrative] review . . . such liquidation shall be made promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued.").

A more apt analogy to this case is *Degussa*, where the Federal Circuit refused to assume that Customs would have treated an entry differently had it been aware of the actual facts relating to that entry. There, the importer introduced two entries of automotive emission catalysts into the United States through the ports of Detroit and Buffalo. *See Degussa*, 87 F.3d at 1302. Both times, Customs officials classified the merchandise as "other parts and accessories of motor vehicles" under subheading 8708.99 of the HTSUS, which corresponded to a duty of 3.1 percent. *Id.* The importer objected, and filed a protest of the Buffalo entry, which Customs eventually sustained, holding that the catalysts were properly designated as "cata-

lytic preparations" under subheading 3815.12.00, which were duty free. *Id.*

Then, more than ninety days but less than a year after the liquidation in Detroit, the importer filed a 19 U.S.C. § 1520(c) reliquidation request as to the Detroit entries, contending that Customs made a mistake of fact by not staying the liquidation of the goods pending Customs' review of the protest of the Buffalo entry. *Id.* Specifically, the importer argued "that if the district director had been aware of the pending review by the Commissioner, he would have deferred liquidation and, following the Commissioner's decision, would have classified the merchandise in accordance with that decision." *Id.* Customs refused to find a mistake of fact, and denied the 19 U.S.C. § 1520(c) request on the grounds that the mistake, if any, was a legal mistake. *Id.*

The Federal Circuit agreed with the result that Customs had reached, pointing out that "there was no factual misapprehension about the nature of the imported merchandise." *Id.* at 1304. The "fact" of which Customs officials in Detroit were ignorant was that the importer had commenced a 19 U.S.C. § 1514 protest proceeding over the Buffalo entry. That fact related to the legal question of the proper classification of the merchandise. The *Degussa* court, however, stopped short of declaring the error to be a legal mistake. Instead, the Federal Circuit focused on the materiality requirement, observing that "[i]t is impossible to state what the district director in Detroit would have done" had he known about the pending Buffalo protest. *Id.*

As *Degussa* demonstrates, not all prima facie "ignorant mistakes" will be remediable under 19 U.S.C. § 1520(c). Indeed, it would be absurd if 19 U.S.C. § 1520(c) were available to correct an entry every time Customs, at liquidation, was "unaware of the existence of the correct alternative set of facts." *Universal Coops.*, 13 CIT at 518, 715 F. Supp. at 1114.

Instead, only if it may be said with certainty that Customs would have liquidated at a different rate if it had known the correct facts will 19 U.S.C. § 1520(c) provide relief to aggrieved importers. When, as in *Degussa* and this case, the mistake of fact relates to events exogenous to the agency activity, and there is no clear statutory or regulatory instruction for the agency to correct that error, then 19 U.S.C. § 1520(c) is inapplicable.

2. *Commerce's Issuance of Erroneous Liquidation Instructions Due to Rivas' Mistake Is Correctable under 19 U.S.C. § 1520(c) as a Clerical Error or Mistake of Fact Not Amounting to an Error in the Construction of a Law*

Hynix's second argument is that Commerce's issuance of erroneous liquidation instructions due to Rivas' mistake is a mistake of fact that is correctable under 19 U.S.C. § 1520(c).

a. There Is No Per Se Bar to Invoking 19 U.S.C. § 1520(c) to Correct a Commerce Error

As a threshold matter, it is necessary to examine Customs' claim that "[a]n error on the part of Commerce cannot be corrected under 19 U.S.C. § 1520(c)(1)." Customs Br. at 17. 19 U.S.C. § 1520(c) allows Customs to reliquidate entries "to correct . . . a clerical error, mistake of fact, or other inadvertence . . . *in any entry, liquidation, or other customs transaction. . . .*" 19 U.S.C. § 1520(c) (1999) (emphasis added). The Court believes Customs' argument burdens the statute with an unduly restrictive interpretation of what happens "in any . . . liquidation." *Id.*

The plain language of the statute does not require that Customs have committed the "clerical error, mistake of fact, or other inadvertence . . . not amounting to an error in the construction of a law." *Id.* To the contrary, the statute's pertinent requirement is that there be "*a* clerical error, mistake of fact, or other inadvertence . . . *in any* entry, *liquidation*, or other customs transaction." 19 U.S.C. § 1520(c) (1999) (emphasis added). On the uncontested facts of this case, there was an error in the liquidations. Although that error initially occurred in the preparation and issuance of Commerce's liquidation instructions, the error also occurred in the liquidations. The latter, as did the liquidation instructions, incorrectly assessed the 2.30 percent antidumping duty rate on the Entries.

Moreover, Congress intended 19 U.S.C. § 1520(c) to be interpreted liberally to provide an effective mode of redress for importers whose goods were liquidated at the wrong rate.[11] *See G&R Produce*, 381 F.3d at 1332–33; *ITT Corp.*, 24 F.3d at 1388–89 ("Congress clearly envisioned a liberal mechanism for the correction of the specific inadvertences set forth in § 1520(c)(1)."). It is also noteworthy that no court has ever held what Customs now urges the Court to find: i.e., that Commerce's errors are per se outside the ambit of 19 U.S.C. § 1520(c).

To the contrary, the Federal Circuit reached the opposite conclusion in a case that involved Commerce's erroneous exclusion of an importer's name from a suspension of liquidation list regarding entries then subject to a countervailing duty order. *See Omni USA, Inc. v. United States*, 840 F.2d 912 (Fed. Cir. 1988). The case arose in the aftermath of the President's transfer of the administration of

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[11] The Court notes the Federal Circuit's *Fujitsu* decision stressed that 19 U.S.C. § 1520(c) was a "limited exception" and proceeded to deny relief under that section. *Fujitsu*, 363 F.3dat 1235. The limiting factor in *Fujitsu* was the requirement that one of the three prima facie correctable errors be present. *See id.* Because the issue of the inclusion *vel non* of Commerce errors involves the interpretation of "liquidation, or other customs transaction," 19 U.S.C. § 1520(c)(1), and not the interpretation of "clerical error, mistake of fact, or other inadvertence," *id.*, there is no reason to allow *Fujitsu's* cautionary analysis prevent the Court from invoking the liberality instruction from *ITT Corp.* and *G&R Produce*.

countervailing duties from the Treasury Department to Commerce. Immediately after the transfer, Commerce published a notice of its intent to review all countervailing duty orders then in effect. *Id.* at 912. In the notice, Commerce stayed the liquidation of all entries subject to its review. *Id.* Commerce mistakenly failed to include the plaintiff's goods on the suspension of liquidation list, and the goods were liquidated. *Id.* The Federal Circuit noted that "Section 1520(c)(1) appear[ed] to fit the . . . case like a glove." *Id.* at 913. It was "a statutory instrumentality that is, according to its terms, exactly and precisely suited to deal with [such] an instance. . . ."[12] *Id.*

Customs attempts to distinguish *Omni* on the grounds that "the error and the inadvertence in *Omni* occurred in the liquidation of the entries." Customs Br. at 18. However, a close reading of *Omni* reveals the substantial similarity between that case and the issue before the Court. In both cases, Commerce issued incomplete or erroneous instructions to Customs, which performed its administrative role in accordance with law, only to achieve an incorrect result. Both errors became adverse to the relevant importer upon liquidation, and in no way can the *Omni* error be said to have occurred "in the liquidation of the entries" to a greater degree than Rivas' error.

The Court recognizes that the *Omni* court ultimately dismissed the case as time barred, and that the quoted language above was dictum. However, the ease with which that court assumed that 19 U.S.C. § 1520(c) applied to an instance where Commerce's inadvertence led to an erroneous liquidation, in conjunction with the plain language of the statute, as well as the Federal Circuit's repeated advisements to interpret the statute liberally, persuades the Court to reject Customs' claim that 19 U.S.C. § 1520(c) excludes all errors committed by Commerce.

Moreover, Customs' arguments reveal a puzzling conception of its own authority to correct Commerce's admitted errors. Customs faults Hynix for not filing a protest under 19 U.S.C. § 1514. *See* Customs Br. at 18–20. More significantly, Customs *actually did grant* Hynix's protests as to entries for which the ninety-day time bar did

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[12] The *Omni* court's description of the liquidation error in that case is ambiguous. For instance, that court reasoned that "[i]f Omni had alerted /C/ustoms to the error it had committed within a year, its right remained to protest any refusal to reliquidate under section 1514, and to carry the case to the court." *Omni*, 840 F.2d at 913 (emphasis added). At the same time, the *Omni* court referred to *Commerce's* "inadvertence and mistake," *id.* at 913, for having "inadvertently failed to inform," *id.* at 914, Customs of the suspension of liquidation list. Because the *Omni* decision rested on untimeliness of the reliquidation request, it is understandable that the *Omni* court did not provide a comprehensive explanation of how 19 U.S.C. § 1520(c) applied to those facts. Given the substantial similarity between the cases, and that the *Omni* court assumed that 19 U.S.C. § 1520(c) applied, it is incumbent on Customs to distinguish *Omni* from these facts. Customs does not even raise the issue of *Omni*'s ambiguous treatment of the origination of the correctable mistake; instead, it argues only that the mistake in *Omni* somehow involved liquidation more than Rivas' mistake. *See* Customs Br. at 17–18.

not apply. *See* Customs' Statement of Facts ¶¶ 27–28. It is unclear why Customs should consider itself permitted to correct Commerce errors pursuant to 19 U.S.C. § 1514, but not 19 U.S.C. § 1520(c), especially when it would appear that 19 U.S.C. § 1520(c) is a more commodious fit for such a correction. After all, 19 U.S.C. § 1520(c) expressly affords Customs the authority to reliquidate based on *errors*. Conversely, the text of 19 U.S.C. § 1514 applies on its face to "decisions of the Customs Service," 19 U.S.C. § 1514(a), a category that would appear a more tenuous fit in light of Customs' purely ministerial role in antidumping proceedings. *See, e.g.*, *Mitsubishi*, 44 F.3d at 977 (noting that "Customs does not make any antidumping 'decisions' ") (*quoting* 19 U.S.C. § 1514(a)); *Mukand Int'l, Ltd. v. United States*, 29 CIT ___, ___, Slip Op. 2005–164, at 9 (Dec. 22, 2005); *Royal Bus. Mach's, Inc. v. United States*, 1 CIT 80, 87 n.18, 507 F. Supp. 1007, 1014 (1980), *aff'd*, 69 C.C.P.A. 61, 669 F.2d 692 (1982).

In addition, the strict division of administrative duties between Customs and Commerce in the determination and assessment of antidumping duties assuages the Court's concern that 19 U.S.C. § 1520(c) could transform into an open-ended grant of authority for Customs to review Commerce determinations. Because Customs is *never* permitted to review Commerce's determinations and conclusions in the course of an antidumping proceeding, *see Mitsubishi*, 44 F.3d at 977, Customs may correct a Commerce error only in a discrete set of circumstances, subject to the limitations contained in the statute itself. Where Commerce has acknowledged a correctable error, and instructed Customs to correct it, such circumstances are present.[13]

In light of the foregoing considerations, the Court finds there is no per se bar for Customs to reliquidate entries, under 19 U.S.C. § 1520(c), in light of errors committed and acknowledged by Commerce.

b. Rivas' Error Is a Mistake of Fact Not Amounting to an Error in the Construction of a Law

Hynix contends that when Rivas inserted the erroneous rate into the template liquidation instruction document without knowing the

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[13] The Court need not decide the more difficult issue of articulating the precise contours of 19 U.S.C. § 1520(c) with respect to errors by Commerce that are not recognized by the agency. It suffices to say that *Mitsubishi*'s pronouncement that "Customs has a merely ministerial role in liquidating antidumping duties[,]" 44 F.3d at 977, stands as a formidable bar to challenges to Commerce decisions (as opposed to mistakes) masked as 19 U.S.C. § 1520(c) reliquidation requests. In addition, the exclusion of mistakes of law from the purview of 19 U.S.C. 1520(c) will be fatal to any reliquidation request purporting to challenge Commerce's legal conclusions. Moreover, in a case like this where Commerce has admitted its error and endeavored to correct it, it is easy to gloss over the otherwise stringent requirement that the error be "manifest from the record or established by documentary evidence." 19 U.S.C. § 1520(c) (1999).

correct rate, she made a mistake of fact. Moreover, Hynix characterizes the mistake as not involving a decisional mistake since "[i]n this case, Ms. Rivas had *no* authority or discretion to choose one rate over the other. . . ." Hynix Reply at 12. Customs, in response, argues that Rivas believed she was entering the correct rate but she did not know the legal consequences of her actions, and therefore committed a mistake of law. *See* Customs Br. at 13–14.

A mistake of law is a decisional mistake, which involves a "choice between two known, alternative sets of facts." *Universal Coops.*, 13 CIT at 518, 715 F. Supp. at 1114. Courts find decisional mistakes where the mistaken party errs in exercising his or her discretionary authority. *See, e.g.*, *Brother Int'l Corp.*, 29 CIT at ___, 368 F. Supp. 2d at 1351–52 (customs broker *misapplied* GRI principles in determining proper tariff classification of merchandise); *Universal Coops.*, 13 CIT at 518, 715 F. Supp. at 1114–15 (Customs committed a decisional mistake when it allegedly *miscalculated* the width of imported twine wire, resulting in a higher duty); *PPG Indus., Inc. v. United States*, 7 CIT 118, 126 (1984) (customs broker failed to file bond under HTSUS, subheading 864.30, which would have entitled importer to duty-free status, because "its *cognizant personnel* did not know that Item 864.30, TSUS, existed") (emphasis added).

Customs has failed to adduce any evidence that Rivas' responsibilities consisted of anything more, in this instance, than the strictly ministerial task of transferring data from the SAS Printout to the liquidation instructions. Her own description of her responsibilities as an import compliance specialist is clear and concise: "I would look at the program, I would draft instructions using a boilerplate, insert the appropriate number and send it to the computer specialist to send to Customs." Rivas Dep. at 13:17–20; *see also id.* 37:15–18 (Rivas testifying that she would typically consult the SAS Program when preparing liquidation instructions). The evidence establishes that an import compliance specialist imports data from the SAS Program and the SAS Printout into the template, and then transfers the template instructions to a computer specialist, *see id.* 27:9–10, who then transmits the document to Customs electronically. *See id.* 27:11–15.

It is evident from the foregoing description of Rivas' duties in preparing liquidation instructions that her role was fundamentally ministerial and not analytical or interpretive. The legally relevant decisions had already been made and were ready to be transcribed by Rivas into the template instructions. If the SAS Program technology allowed for printing liquidation instructions directly, there would have been no error at all. Conversely, decisional mistakes of law cannot be hypothetically sidestepped by imagining computer technology and personnel redundancy.

The error is more properly characterized as a mistake of fact. A fact existed (the importer-specific assessment rate for Hyundai Elec-

tronics America was 1.57 percent) but was unknown, and a fact was believed (the final margin of 2.3 percent should be used for all importers) despite its incorrectness. The scenario is analogous to *Xerox*: in that case, as here, an employee vested with non-discretionary authority executed instructions and was found to have committed a mistake of fact. The crucial commonality is the complete absence of any discretionary, decisional authority on the part of the employee. Also like *Xerox*, the materiality requirement can hardly be disputed here, since it is obvious that Rivas would have drafted correct instructions had she been made aware of her mistake.

Customs' arguments to the contrary must be rejected because they fail to take into account the nature of Rivas' occupation. It is irrelevant that the facts as to which Rivas made a mistake were of legal import. Those facts related to Rivas only as data to be entered into a template form. Since Rivas was not engaged, in this instance, in the "construction of a law," 19 U.S.C. § 1520(c) (1999), and because she had no decisional authority, she did not commit a mistake of law.

c. Rivas' Error Is a Clerical Error Not Amounting to a Mistake in the Construction of a Law

Though the Court finds that Rivas' mistake amounts to a mistake of fact, the Court finds it appropriate to explain why Customs should have labeled Rivas' mistake a "clerical error" and granted the reliquidation request.[14] Such a response would have obviated consideration of the significantly more complex "mistake of fact" jurisprudence.[15]

"A clerical error is a mistake by a clerk or other subordinate, upon whom devolves no duty to exercise judgment, in writing or the copying figures or in exercising his intention." *PPG Indus.*, 7 CIT at 124. Clerical errors are characterized by the absence of exercising judgment and intention, as when a mistake is made in copying or typing figures, or where figures have been transposed. *See id.* at 124 n.7 (*citing inter alia Rapaport v. United States*, 4 CIT 215 (1982), *Louis Aisenstein & Bros., Inc. v. United States*, 34 Cust. Ct. 268, Abs. 58715 (1955)).

In support of that proposition, the *PPG Indus.* court cited to the *Yamada* case from Court of Customs and Patent Appeals (**"CCPA"**), the predecessor of the Federal Circuit. *See PPG Indus.*, 7 CIT at 124 (*citing Yamada v. United States*, 26 C.C.P.A. 89 (1938)). In *Yamada*,

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[14] The three categories of prima facie correctable errors–i.e., clerical error, mistake of fact, and inadvertence–are not mutually exclusive. *See Ford Motor Co.*, 157 F.3d at 857.

[15] Hynix limited its arguments before the Court to the mistake of fact issue, despite having claimed the mistake was a clerical error in the administrative proceedings below. *See* HQ 229808, 2003 U.S. CUSTOM HQ LEXIS 215 at *4. As such, the Court considered it appropriate to address the parties' arguments relating to the mistake of fact jurisprudence, in spite of the fact that Rivas' error is more accurately described as a "clerical error" or "inadvertence."

a supervisor at a brokerage firm gave a subordinate broker a certificate and instructed him to file it with one hundred entries for the importer. *Yamada*, 26 C.C.P.A. at 92. The broker then erroneously and carelessly substituted a different form for thirty-five of the hundred entries. *Id.* Customs argued that 19 U.S.C. § 1520 did not apply because the broker had been "careless and indifferent" and could therefore not be said to have committed a clerical error. *Id.* at 93–94.

The CCPA disagreed, noting instead that "[i]t is instead our view that clerical error is usually the result of carelessness." *Id.* at 94. The *Yamada* court quoted from a 1908 case that is still relevant today:

> Clerical error implies negligence or carelessness; but the question is: Whose is the negligence? If it is that of a "clerk, writer, or copyist," it is clerical error. The expression assumes that the mistake or negligence or carelessness is that of one engaged in the subordinate service of transcription, copying or comparison; *a labor not requiring original thought*.

Id. (*quoting Morimura Bros. v. United States*, 160 F. 280, 281 (C.C.S.D.N.Y. 1908) (citation omitted)) (emphasis added).

Lest the continuing authority of these older cases be put in question, it bears mention that the Federal Circuit has recently cited both *Yamada* and *Morimura Bros.* with approval. *See Ford Motor Co.*, 157 F.3d at 860. In *Ford Motor Co.*, the Federal Circuit summarized the *Yamada* holding in terms that evoked language from the *PPG Indus.* case: "Thus, Yamada teaches that a subordinate acting contrary to binding instructions commits a clerical error. When a subordinate is given binding instructions on particular aspects of a task, no duty devolves upon him to exercise discretion or judgment in carrying out those aspects." *Id.* Therefore, in cases where an employee or other agent has failed to follow "complete, binding, non-discretionary instructions," *id.* at 861, a clerical error has occurred.

In this case, Rivas received the results from the SAS Program and was charged with entering the data contained therein into boilerplate liquidation instructions for Customs. Her orders were "complete, binding, [and] non-discretionary." *Id.* Moreover, her mistake occurred while performing a "subordinate service of transcription, copying or comparison." *Morimura Bros.*, 160 F. at 281. Her work, while important, was "a labor not requiring original thought." *Id.*

In light of these considerations, the Court finds that Rivas' error constituted a "clerical error" and thus justified reliquidation under 19 U.S.C. § 1520(c) upon Hynix's request.

V. *CONCLUSION*

The Court observes briefly that it is unfortunate that Hynix had to bring this lawsuit in the first place. In this case, Hynix, Commerce, and Customs all admit that an obvious, unintended, and unantici-

pated human error occurred. Nevertheless, Customs chose to drag the Court and the plaintiff into the bramble bush of 19 U.S.C. § 1520(c) to fight reliquidation, set against the obvious equitable result. To its credit, Commerce did everything in its power to correct its obvious mistake, only to be stonewalled by Customs' intransigence. In the Court's view, the error should have been corrected at the outset.

For the reasons set forth in Part IV of the opinion, the Court grants Hynix's motion for summary judgment and denies Customs' cross-motion for summary judgment. A separate order will be issued in accordance with this conclusion.

Slip Op. 06–16

FRANK GRUNERT, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: MUSGRAVE, Judge
Court No. 05–00113

MEMORANDUM ORDER

Frank Grunert, *pro se*, for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, United States Department of Justice, Civil Division, Commercial Litigation Branch (*Delfa Castillo*); Jeffrey Kahn, Office of the General Counsel, United States Department of Agriculture, of counsel, for the defendant.

On February 16, 2005, plaintiff filed a complaint requesting judicial review of the United States Department of Agriculture's determination denying him certification for Trade Adjustment Assistance benefits. On March 9, 2005, the clerk's office mailed plaintiff a letter acknowledging receipt of the complaint and advising plaintiff of the specific steps required to maintain an action in this Court. On May 11, 2005, defendant filed an answer to the complaint.

On July 20, 2005, the Court sent each party a letter requesting that they confer and submit a proposed scheduling order that would govern the timing of various proceedings. On August 8, 2005, defendant filed a consent motion for an extension of time to file the proposed scheduling order. Defendant explained that the extension was necessary because plaintiff

> advised . . . that he would soon would be requesting the Court to appoint an attorney for him. He agreed that an extension of time of approximately 60 days within which to file a status report and proposed scheduling order with the Court was desir-

> able to allow him to attempt to obtain an attorney. On August 5, 2005, . . . [the] Case Management Supervisor at the Court[ ] confirmed that a 60-day time period would be an appropriate length of time to provide a plaintiff with the necessary forms for seeking a court-appointed attorney and to process the forms when completed.

Defendant's Consent Motion for an Enlargement of Time in Which a Joint Status Report and Proposed Scheduling Order May be Filed at 1–2. The Court granted this motion and ordered the parties to file the status report and proposed scheduling order by October 11, 2005.

On October 11, 2005, defendant filed a proposed scheduling order. The proposed order included provisions for either dismissing the action in its entirety or proceeding with briefing. Defendant explained that it had been unable to receive plaintiff's consent to the proposed order because

> [a]s at times in the past, during the week of October 3, 2005, our efforts to communicate with Mr. Grunert, by telephone were hampered by his apparent lack of an answering machine, and because we have been communicating with Mr. Grunert through his wife. On October 11, 2005, we also failed to communicate directly with Mr. Grunert, although it appeared that Mrs. Grunert was speaking with him while we were on the telephone. It was Mrs. Grunnert's [sic] impression that Mr. Grunert had asked us to dismiss this case for him. We informed Mrs. Grunert that her husband had not communicated with us, and we urged her to request Mr. Grunert to telephone us for purposes of conferring on a briefing schedule or to discuss dismissal. As of the filing of this motion, we have not heard from Mr. Grunert. As a courtesy, we will be sending Mr. Grunert a stipulation of dismissal shortly.

Defendant's Proposed Briefing Schedule at 1–2. Because it was hoped that plaintiff would overcome his communication difficulties and consult directly with defendant, the Court took no immediate action on defendant's proposed order.

On January 5, 2006, the Court requested that defendant provide a status report. Specifically, the Court requested that defendant attempt to contact plaintiff in order to ascertain how (or if) plaintiff wished to proceed. On January 9, 2006, counsel for the defendant presented a report. Counsel reported that, although she had been unable to contact plaintiff during normal business hours, she had been able to contact plaintiff's wife over the weekend. Counsel reported that during the course of her conversation with plaintiff's wife, counsel understood that plaintiff was hesitant about going forward with the action because he could not retain a lawyer. Counsel further reported that she explained to plaintiff's wife that the Court could assign counsel to plaintiff and outlined the steps necessary to

do so. Counsel reported that she understood plaintiff would follow the suggested course of action and contact the Court in order to begin the process. To date plaintiff has not contacted the Court and, thus, the time for definitive action in this matter is nigh. *See, e.g., Burton v. United States Sec'y of Agric.*, 27 CIT ___, ___, Slip Op. 05–125 at 3 (Sept. 14, 2005) (dismissing case and noting plaintiff "might have availed herself of the proffered assistance of the clerk's office to obtain legal representation *in forma pauperis*. . . ."). Therefore, the parties are

ORDERED to show cause, if there be any, by February 27, 2006, why this action should not be dismissed for lack of prosecution pursuant to USCIT R. 41(b)(3) of the Rules of this Court.

Slip Op. 06–17

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

FORMER EMPLOYEES OF COMPUTER SCIENCES CORPORATION, Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Court No. 04–00149

[Held: Labor's second remand determination is not supported by substantial evidence and is not in accordance with law. Case remanded for a third time.]

Dated: January 27, 2006

Sidley Austin Brown & Wood LLP, (*Neil R. Ellis*, *Rajib Pal*, and *Sharon H. Yuan*) for Former Employees of Computer Sciences Corporation, plaintiffs.

Stuart E. Schiffer, Deputy Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Delfa Castillo*); of counsel: *Peter Nessen*, Office of the Solicitor, United States Department of Labor, for United States Department of Labor, defendant.

OPINION AND ORDER

TSOUCALAS, Senior Judge: In this matter, Former Employees of Computer Sciences Corporation ("Plaintiffs"), challenge the second remand determination of the Department of Labor ("Labor") conducted pursuant to the Court's decision in *Former Employees of Computer Sciences Corp. v. Labor* ("*CSC I*"), 29 CIT ___, 366 F. Supp. 2d 1365 (2005), of which familiarity is presumed. Very briefly, Plaintiffs are former employees of Computer Sciences Corporation ("CSC") who were separated from their employment as information technology professionals. *See CSC I*, 29 CIT at ___, 366 F. Supp. 2d at 1366. Labor initially denied Plaintiffs' eligibility for certification of Trade Adjustment Assistance ("TAA") under Title II of the Trade

Act of 1974, *as amended* 19 U.S.C. § 2271 (West Supp. 2004) (the "Trade Act"). *See Negative Determination Regarding Eligibility To Apply for Worker Adjustment Assistance* ("*Negative Determination*"), TA-W-53,209 (Dep't Labor Oct. 24, 2003) Admin. R. 55–56; *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance*, 68 Fed. Reg. 66,877–78 (Dep't Labor Nov. 28, 2003); *Notice of Negative Determination on Reconsideration for Computer Sciences Corporation, Financial Services Group ("FSG"), East Hartford, Connecticut* ("*Negative Reconsideration Determination*"), Admin. R. 78–80 (Dep't Labor Feb. 3, 2004) *published at* 69 Fed. Reg. 8,488 (Dep't Labor Feb. 24, 2004); *Notice of Negative Determination on Reconsideration on Remand for Computer Sciences Corporation, Financial Services Group, East Hartford, Connecticut* ("*Remand Negative Determination*"), Supplemental Admin. R. 13–17 (Dep't Labor July 29, 2004) *published at* 69 Fed. Reg. 48,526 (Dep't Labor Aug. 10, 2004).[1] In *CSC I*, the Court held that Labor's *Negative Determination, Negative Reconsideration Determination* and *Remand Negative Determination* were not supported by substantial evidence or in accordance with law. *See CSC I*, 29 CIT at ___ , 366 F. Supp. 2d at 1373. Accordingly, the Court remanded this case ordering Labor to "(1) explain why code, which is used to create completed software, is not a software component; (2) examine whether Plaintiffs were engaged in the production of code; (3) investigate whether there was a shift in production of code to India; (4) investigate whether code imported from India is like or directly competitive with the completed software or any component of software formerly produced by Plaintiffs; and (5) investigate whether there has been or is likely to be an increase in imports of like and directly competitive articles by entities in the United States. . . ." *Id.*, 366 F. Supp. 2d at 1373. On remand, Labor again determined that Plaintiffs were not eligible for TAA certification because Plaintiffs do not produce an article under the Trade Act. *See Notice of Negative Determination On Remand for Computer Sciences Corporation, Financial Services Group, East Hartford, Connecticut* ("*Second Remand Negative Determination*"), 2Supp. Admin. R. 171, 175 (Dep't Labor Aug. 24, 2005) *published at* 70 Fed. Reg. 52,129, 52,130 (Dep't Labor Sept. 1, 2005).

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[1] The "Admin. R." refers to the administrative record from Labor filed with the Court on May 18, 2004. The "Supplemental Admin. R." refers to the administrative record filed with the Court on August 2, 2004, in conjunction with remand results from Labor's voluntary remand. The "2Supp. Admin. R." refers to the administrative record filed with the Court on August 24, 2005, pursuant to the Court ordered remand in *CSC I*. References to "Confidential 2Supp. Admin. R." refer to the confidential version of the August 24, 2005, record.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 2395(c) (2000) and 28 U.S.C. § 1581(d) (2000).

STANDARD OF REVIEW

In reviewing a challenge to Labor's determination of eligibility for trade adjustment assistance, the Court will uphold Labor's determination if it is supported by substantial evidence on the record and is otherwise in accordance with law. *See* 19 U.S.C. § 2395(b); *Woodrum v. Donovan*, 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd*, *Woodrum v. United States*, 737 F.2d 1575 (Fed. Cir. 1984)). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987); *see also Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Additionally, when reviewing Labor's conclusions of law, the Court will consider whether they are "in accordance with the statute and not be arbitrary and capricious, and for this purpose the law requires a showing of reasoned analysis." *Former Employees of Rohm & Haas Co. v. Chao*, 27 CIT ___ , , 246 F. Supp. 2d 1339, 1346 (2003) (quoting *Int'l Union v. Marshall*, 584 F.2d 390, 396 n.26 (D.C. Cir. 1978)). Under this standard, the Court will "sustain the agency's interpretation of the statute where it has a rational basis in law, even though the court might have reached a different interpretation." *Abbott v. Donovan*, 6 CIT 92, 100–01, 570 F. Supp. 41, 49 (1983). The Court, however, will "reject the agency's interpretation or application of a statute when it is inconsistent with the legislative purpose of the statute or frustrates Congress' intent." *Id.* at 101, 570 F. Supp. at 49. "[I]t is for the courts, to which the task of statutory construction is ultimately entrusted, to determine whether or not administrative interpretations are consistent with the intent of Congress and the words of the Act." *Woodrum*, 5 CIT at 194, 564 F. Supp. at 829.

Moreover, although "the nature and extent of the investigation are matters resting properly within the sound discretion of [Labor,]" *Former Employees of Galey & Lord Indus. v. Chao*, 26 CIT ___ , ___ , 219 F. Supp. 2d 1283, 1286 (2002) (quoting *Former Employees of CSX Oil & Gas Corp. v. United States*, 13 CIT 645, 651, 720 F. Supp. 1002, 1008 (1989) (citation omitted)), good cause to remand exists if Labor's "chosen methodology is so marred that [Labor's] finding is arbitrary or of such a nature that it could not be based on substantial evidence." *Id.* The Court's review of Labor's determination denying certification of eligibility for TAA benefits is confined to the administrative record before it. *See* 28 U.S.C. § 2640(c); *see also Int'l Union v. Reich*, 22 CIT 712, 716, 20 F. Supp. 2d 1288, 1292 (1998).

DISCUSSION

I. Contention of the Parties

A. Plaintiffs' Contentions

Plaintiffs argue that Labor's determination that they are ineligible for TAA benefits is not based on substantial evidence in the record, is arbitrary and capricious, and is not in accordance with law. *See* Comments Pls.' Former Employees Computer Sciences Corp. Regarding Redetermination Results Filed Dep't Labor Aug. 24, 2005 ("Pls.' Comments") at 4. Plaintiffs request that the Court vacate Labor's second remand determination and remand this case with instructions to certify Plaintiffs because substantial evidence on the record indicates that Plaintiffs have fulfilled the eligibility requirements for TAA certification. *See* Pls.' Comments at 3–4. Specifically, Plaintiffs argue that Labor's determination that software code is not an article is arbitrary and capricious, ignoring recent Customs rulings. *See id.* at 5. Rather, Plaintiffs assert that producing software or software code, a component of software, is an article within the meaning of the Trade Act. *See id.* Plaintiffs cite HQ 114459, wherein Customs determined that software modules, (source and/or binary code), are objects of trade and commerce in their ordinary use but exempt from duty under General Note 3(e) of the Harmonized Tariff Schedule of the United States ("HTSUS"). *See* Pls.' Comments at 5–6. Since all goods are subject to a duty unless exempted under a specific provision, Plaintiffs argue that HQ 114459 indicates that software code is an article under the HTSUS. *See id.* Plaintiffs contend that because Labor is obligated to follow Customs' interpretation of the HTSUS, which governs the definition of articles, and software is an article under the HTSUS, it is also an article under the Trade Act. *See id.* at 6–7. Plaintiffs also contend that Labor errs in requiring an article to be tangible under the Trade Act. *See id.* at 8. Even if tangibility is a requirement, however, Plaintiffs argue that software is tangible because it can be possessed or realized, unlike a service. *See id.* Plaintiffs maintain that software code is a component of completed software, although such a conclusion is unnecessary here because software code is itself an article under the Trade Act. *See id.* at 9–10.

Furthermore, Plaintiffs assert that substantial record evidence shows there has been a shift of production of software code to India. *See id.* at 11. On remand, Labor's investigation determined that the software code written in India is similar to the software code formerly written by the Plaintiffs in the United States. *See id.* at 12. Thus, Plaintiffs contend that the shift in production was of like or directly competitive articles as required by the Trade Act. *See* Pls.' Comments at 12. Plaintiffs finally argue that there has been or is likely to be an increase in imports of software code. *See id.* Plaintiffs maintain that regardless of the mode of entry, i.e. whether on a physical medium or electronic transmission, software code brought

into the United States from India constitutes an importation for purposes of TAA. *See id.* at 12–13. Plaintiffs emphasize that the mode of entry of an article, especially software, into the United States is not an issue with Customs, as expressed in HQ 114459, or with the United States International Trade Commission. *See id.* at 13–14. Labor concluded in its second remand determination that CSC has increased its delivery of software code into the United States and the code imported is similar to code formally written by Plaintiffs. *See id.* at 17. Thus, Plaintiffs argue this increase in the electronic delivery of software code from abroad constitutes an increase in imports of like or directly competitive articles as required by 19 U.S.C. § 2272(a). *See id.* at 18. Accordingly, Plaintiffs argue that substantial evidence on the record support their eligibility requirements for TAA certification. *See id.* at 3–4.

B. Labor's Contentions

Labor responds that the Court should affirm its second remand results because they are supported by substantial evidence and are otherwise in accordance with law. *See* Def.'s Resp. Pls.' Comments Dep't Labor's Remand Results ("Labor's Resp.") at 6. Labor again determined in its second remand determination that Plaintiffs did not produce an article under the Trade Act. *See* Labor's Resp. at 8. Since certification for TAA benefits pursuant to either 19 U.S.C. § 2272(a)(2)(A) or (B) depends on whether software code is considered an article, Labor argues that Plaintiffs' challenge fails. *See id.* at 13. In its second remand determination, Labor distinguished code from completed computer software on a physical medium maintaining that because software code is not embodied on a physical medium, it is not an article under the Trade Act. *See id.* at 10. Thus, although Labor acknowledged that CSC increased the importation of software code into the United States from India, Labor determined that CSC did not shift production of an article for TAA purposes. *See id.* Moreover, Labor asserts that it is impossible to determine whether the software code written in India is like or directly competitive with the software code formally produced by Plaintiffs because such a comparison assumes the existence of articles to compare. *See id.*

Labor argues that because Plaintiffs have alleged a shift in production, they must satisfy the threshold requirement showing an actual shift in production to a foreign country of articles they formerly produced. *See id.* at 13. Since the software code Plaintiffs wrote is intangible until it is incorporated onto a physical medium at the Hartford facility, the code is not an article for purposes of TAA certification. *See* Labor's Resp. at 15-16. Labor, indeed, likens code to an idea. *See id.* at 16. Labor states that this court in *Former Employees of Murray Eng'g v. Chao* ("*Murray Eng'g*"), 28 CIT ___ , 358 F. Supp. 2d 1269 (2004), recognized that the form in which electronic infor-

mation is embodied may be a factor in determining whether it is considered an article under the Trade Act. *See* Labor's Resp. at 16. Furthermore, *Murray Eng'g* also recognized that the Trade Act indicates that the HTSUS governs the definition of articles, which are items subject to a duty. *See id.* Labor argues that software code is not dutiable under the HTSUS, and thus is not an article. *See id.* Labor further argues that Plaintiffs' interpretation of HQ 114459 is misplaced. *See id.* at 17–18. In HQ 114459, Customs found software code to be "goods or merchandise," which Labor argues are not TAA statutory terms and therefore not relevant to the Court's analysis. *See id.*

Labor also contends that whether coding is a component of an article is not relevant or dispositive in whether there has been a shift in production. *See id.* at 22. Labor states that the Trade Act refers to "articles," and thus whether software code is an article is dispositive for TAA eligibility. *See id.* at 23. Furthermore, Labor reasons that "until it is contained in computer software, code is not a component of computer software." Labor's Resp. at 23. Rather, software code is like an idea that will eventually lead to the existence of an article. *See id.* Labor asserts that in order for code to be a component of an article, the code would have to be an article itself, possessing tangibility and be embodied on a physical medium. *See id.* at 24.

Finally, Labor argues that there has not been nor is there likely to be an increase in imports of articles like or directly competitive with the articles CSC produced. *See id.* Labor surveyed seven of CSC's major competitors and concluded that none of them increased imports of software code during the review period and were not likely to import software code in the future. *See id.* at 25. Consequently, Labor asserts that Plaintiffs' contention that electronic transmissions of software code into the United States will increase is not supported by record evidence. *See id.* at 25–26. Labor concludes that Plaintiffs fail to satisfy 19 U.S.C. § 2272(a)(2) because software code formerly written byPlaintiffs, which was not embodied on a physical medium, is not an article under the Trade Act. *See id.* at 26.

II. Analysis

The Trade Act provides TAA benefits to workers who have been separated as a result of increased imports into or shifts of production out of the United States. *See* 19 U.S.C. § 2272. Such benefits include training, re-employment services and various allowances including income support, and job search and relocation allowances. *See* 19 U.S.C. §§ 2295–98. Labor is required to certify a group of workers as eligible to apply for TAA benefits if "a significant number or proportion of the workers in such workers' firm, or appropriate subdivision of the firm, have become totally or partially separated [from employment]," and if one of two further sets of conditions are satisfied. 19 U.S.C. § 2272(a). First, such workers may qualify if:

> (i) the sales or production, or both, of such firm or subdivision have decreased absolutely; (ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and (iii) the increase in imports . . . contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision.

19 U.S.C. § 2272(a)(2)(A). Second, the workers may also qualify if there has been a shift in production to a foreign country by the workers' firm or subdivision of articles like or directly competitive with articles produced by the firm or subdivision, and if any of the following conditions are satisfied: (1) the shift in production was to a country which is a party to a free trade agreement with the United States; (2) the shift in production was to a country that is a beneficiary under one of three listed trade preference programs; or (3) there has been or is likely to be an increase in imports of articles like or directly competitive with articles produced by the subject firm or subdivision. *See* 19 U.S.C. § 2272(a)(2)(B). It follows then, that for TAA eligibility, Plaintiffs had to produce an article within the meaning of the Trade Act. *See* 19 U.S.C. § 2272(a), *see also Former Employees of Marathon Ashland Pipeline, LLC v. Chao*, 26 CIT 739, 743–44, 215 F. Supp. 2d 1345, 1351 (2002) *rev'd other grounds* 370 F.3d 1375 (Fed. Cir. 2004) (referring to an earlier version of the Trade Act).

A. Labor's Determination that Software Code Must be on a Physical Medium to be an Article Is Not in Accordance With Law

1. The Trade Act, Implementing TAA Regulations and the HTSUS Do Not Require Tangibility as a Requirement for an Item to be an Article

In its second remand results, Labor determined that "[c]ode, not embodied on a physical medium, is not considered an article for TAA purposes. It is not found on the Harmonized Tariff Schedule." *See Second Remand Negative Determination*, 70 Fed. Reg. at 52,130. Under this "HTSUS test," Labor interpreted General Note 3(I)[2] to exempt software code not on a physical medium from the HTSUS. *See id.* Labor, therefore, determined that software code is not an article. *See id.* Labor, however, does not cite to any statute, regulation, persuasive interpretation or its own previous practice to support its con-

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[2] Since there is no "General Note 3(I)" in the 2004 HTSUS, as cited by Labor in its *Second Remand Negative Determination*, 70 Fed. Reg. at 52,130, and General Note 3(i) deals with authority for the Department of the Treasury to issue rules and regulations, the Court understands Labor to mean General Note 3(e), which exempts telecommunications transmissions.

clusion that an article must be tangible under the Trade Act. *See id.* at 52,130–31. The Court holds that Labor's determination requiring articles to be tangible is a cursory explanation and not a reasoned interpretation of the Trade Act and the HTSUS.

The Trade Act does not define the term "articles" within the statutory language, and specifically absent is a tangibility requirement. *See* 19 U.S.C. §§ 2101–2495 (2000). Likewise, the implementing regulations also do not define the term "articles." *See* 19 C.F.R. § 0.1 *et seq.* (2004). The language of the Trade Act, however, does clearly indicate that the HTSUS governs the definition of articles because it consistently refers to an "article" as items subject to a duty. *See Murray Eng'g*, 28 CIT at ___ , n.7, 358 F. Supp. 2d at 1272, n.7 (citing 19 U.S.C. §§ 2119 & 2252(d)); *see also SKF USA Inc. v. United States*, 263 F.3d 1369, 1382–83 (Fed. Cir. 2001) (holding that where Congress has used a term repeatedly, it is considered to have the same meaning in each reference). Congress has determined that the HTSUS is "considered to be statutory provisions of law." 19 U.S.C. § 3004. Labor's regulations indicate that it chose to reference the HTSUS in determining what constitutes an article, as a matter of law. *See* 29 C.F.R. § 90.11(c) (2004); *Former Employees of Electronic Data Systems Corp. v. Labor* ("*EDS I*"), 28 CIT ___ , ___ , 350 F. Supp. 2d 1282, 1288 (2004). Customs, not Labor, is explicitly delegated by Congress to apply and interpret the HTSUS. *See* 19 U.S.C. § 1500. As such, Labor's interpretation of the HTSUS may be afforded respect according to *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), meaning "proportional to its 'power to persuade.' " *EDS I*, 28 CIT at ___ , 350 F. Supp. 2d at 1286–87 (citing *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001); *Skidmore*, 323 U.S. at 140).

All "goods provided for in [the HTSUS] and imported into the customs territory of the United States . . . are subject to duty or exempt therefrom as prescribed in general notes 3 through 18, inclusive." General Note 1, HTSUS (2004).[3] "Exempt" is defined as "free or released from a duty or liability to which others are held." *Black's Law Dictionary* 612 (8th ed. 2004). General Note 3(e) is titled "exemptions" and states that "telecommunications transmissions" are "not goods subject to the provisions of the tariff schedule." General Note 3(e), HTSUS. Here, Labor implicitly concedes that the software code imported from India is a telecommunications transmission. *See Second Remand Negative Determination*, 70 Fed. Reg. at 52,130. General Note 3(e) supports the conclusion that telecommunications transmissions, which would include transmissions of software code via the Internet, are exempt from duty while acknowledging that they are goods entering into the customs boundaries of the United States. *See* General Note 3(e), HTSUS. The mode of importation, via

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[3] The General Notes are included as part of the legal text of the HTSUS. *See* The Preface to the 16th Edition of the HTSUS, 1.

tangible compact discs versus the Internet, is not the material analysis. *See Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923) (stating "[i]mportation . . . consists in bringing an article into a country from the outside. If there be an actual bringing in it is importation regardless of the mode in which it is effected."). The HTSUS, on its face, does not indicate that exemption from paying duties is synonymous with exclusion, *i.e.* not included, as Labor would like the Court to believe. *See Second Remand Negative Determination*, 70 Fed. Reg. at 52,130. Hence, software code transmitted electronically is exempted, which evidences that it has to be covered by the HTSUS. Therefore, Labor's interpretation of General Note 3(e) is not in accordance with the plain meaning of the word "exempt" in the HTSUS. The Court finds that Labor's *Second Remand Negative Determination* failed to reasonably explain how telecommunications transmissions, which is considered an importation of goods under the HTSUS, are somehow not articles under the Trade Act for TAA purposes.

2. Other Agencies' Interpretations of Customs Law Do Not Require Software Code to be Tangible

Labor's legal conclusion, that software code must be on a physical medium to be an article, is also incongruous with interpretations from both the United States Bureau of Customs and Border Protection ("Customs") and the United States International Trade Commission ("ITC"). The Court is persuaded by these interpretations because of the agencies' extensive experience in customs law.

Congress has explicitly delegated Customs the authority to apply and interpret the HTSUS. *See* 19 U.S.C. § 1500. Labor's tangibility requirement and interpretation of General Note 3(e) of the HTSUS is discordant with Customs Ruling Letter 114459 ("HQ 114459") 1998 U.S. CUSTOM HQ LEXIS 640 (Sept. 17, 1998). In HQ 114459, Customs addressed specifically whether "software modules and products (source code and/or binary code)" imported into the United States via the Internet was subject to a duty. HQ 114459, 1998 U.S. CUSTOM HQ LEXIS 640 at *1–2. Customs concluded that software modules and products brought into the Unites States via the Internet is an "importation of merchandise." *Id.* at *3. Notably, Customs applied the Supreme Court's holding in *Cunard S.S.*, to this modern situation stating "[t]he fact that the importation of the merchandise via the Internet is not effected by a more 'traditional vehicle' (e.g., transported on a vessel) does not influence our determination." *Id.* Cognizant that Customs is the delegated authority in determining what items are included in the HTSUS, *see* 19 U.S.C. § 1500, Labor fails to explain why its interpretation of the HTSUS leads to a different conclusion. Labor argues that the terms "goods" and "merchandise" are not TAA statutory terms and therefore not relevant to the Court's analysis. *See* Labor's Resp. at 18. The Court, however, disagrees. Labor has stated that it interprets the term "ar-

ticles" to be consistent with the HTSUS, which is the foundation of HQ 114459. *See* 29 C.F.R. § 90.11(c); *see also EDS I*, 28 CIT at ___, 350 F. Supp. 2d at 1288. Therefore, Labor's interpretation should not be contrary to Customs' without a reasoned analysis that has the "power to persuade." *Skidmore*, 323 U.S. at 140.

While Customs interprets the HTSUS, the ITC is responsible for continually reviewing and recommending modifications to the HTSUS as it considers them necessary or appropriate. *See* 19 U.S.C. §§ 1332 & 3005. Congress has delegated broad authority to the ITC to determine what constitutes and "article" for purposes of Title 19 of the United States Code. *See id.*; *Former Employees of Electronic Data Systems, Corp. v. United States* ("*EDS II*"), 29 CIT ___, ___, Slip Op. 05–148 at 13 (2005) ("Congress mandated that the ITC develop HTSUS to resolve all questions relative to the classification of articles in the several sections of the Customs law." (citations omitted)). Labor has acknowledged that the ITC has such broad powers. *See id.* In interpreting another statute, the Supreme Court stated that it begins with "the premise that when Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended the text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, ___, Slip Op. 04–35 at 4 (Mar. 30, 2005).

The ITC in interpreting section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, has treated software as an article of importation regardless of its mode of importation. *See* Commission Opinion on Remedy, the Public Interest, and Bonding at 28–29 *in In the Matter of Certain Hardware Logic Emulation Systems and Components Thereof*, Inv. No. 337–TA–383, Publication No. 3089 (ITC, Mar. 30, 1998);[4] *see also EDS II*, 29 CIT at ___, Slip Op. 05–148 at 12–14. In its *Second Remand Negative Determination*, Labor did not address how its limiting definition under the Trade Act can be reconciled with the ITC's interpretation of an article under 19 U.S.C. § 1337. While not addressing the ITC's interpretation of an article here, Labor does acknowledge that its determinations of what is an article should concur with the HTSUS. *See* 29 C.F.R. § 90.11(c); *EDS I*, 28 CIT at ___, 350 F. Supp. 2d at 1288. Given the ITC's role in updating the HTSUS, its interpretation of software code is highly probative to the Court. The Court remands this issue to Labor to consider the ITC's interpretation and explain its departure therefrom.

In conclusion, Labor fails to recognize or adapt its position to recent technology. Given that "remedial statutes [such as 19 USCS § 2272] are to be liberally construed," *Int'l Union, UAW v. Marshall*, 584 F.2d 390, 396 (D.C. Cir. 1978) (interpreting an earlier version of the Trade Act), Labor is stubbornly arguing its position that software

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[4] Publication No. 3089 can be found on the ITC's website at http://edisweb.usitc.gov/edismirror/337-383/Violation/46666/46666 /44a/C23E.pdf.

code must be embodied on a physical medium, which is supported by a shaky foundation. The plain language of the Trade Act does not require that an article must be tangible. Labor's regulations read together with the HTSUS support the conclusion that software code, regardless of the mode of importation, is an article under the Trade Act. Moreover, Customs and the ITC do not differentiate between physical or electronic importation of software and software code. Accordingly, the Court holds that Labor's determination that software code must be tangible to be an article under the Trade Act is not in accordance with law as currently articulated by Labor.

B. Labor's Determination That Plaintiffs Are Not Eligible for TAA Certification is Not Supported by Substantial Evidence on the Record

Labor agrees that a significant number of CSC's former code writers were separated from their employment, thus Plaintiffs satisfy the first requirement of 19 U.S.C. § 2272(a). *See CSC I*, 29 CIT at ___ , 366 F. Supp. 2d at 1371. It is the remaining requirements under 19 U.S.C. § 2272(a)(2)(B) that Labor determined Plaintiffs did not satisfy. *See generally Second Remand Negative Determination*, 70 Fed. Reg. at 52,129–31. In *CSC I*, the Court held that Labor had "failed to satisfy its obligation to compare the domestic product with the foreign made product" and thus failed to "meet the threshold requirement of reasonable inquiry." *CSC I*, 29 CIT at ___ , 366 F. Supp. 2d at 1372. Thus, the Court remanded this case ordering Labor to "(1) explain why code, which is used to create completed software, is not a software component; (2) examine whether Plaintiffs were engaged in the production of code; (3) investigate whether there was a shift in production of code to India; (4) investigate whether code imported from India is like or directly competitive with the completed software or any component of software formerly produced by Plaintiffs; and (5) investigate whether there has been or is likely to be an increase in imports of like or directly competitive articles by entities in the United States." *Id.*, 366 F. Supp. 2d at 1373. Labor attempts to avoid the Court's remand instructions with its simple assertion that because software code is not an article under the Trade Act, Plaintiffs fail to satisfy 19 U.S.C. § 2272(a)(2). *See Second Remand Negative Determination*, 70 Fed. Reg. at 52,130. The Court, however, finds that Labor's legal conclusions are not in accordance with law. Mindful of that finding, the Court will examine if Labor's factual determinations are supported by substantial evidence on the record. Thus, the Court will address each of its remand instructions in turn.

First, the Court ordered Labor to explain why it considered software code to not be a component of software. *See CSC I*, 29 CIT at ___ , 366 F. Supp. 2d at 1373. On remand, Labor determined that it does not "consider software code, not embodied on any

physical medium, to be a component of completed software." *Second Remand Negative Determination*, 70 Fed. Reg. at 52,130. Labor further stated that

> To be a component [Labor] requires that the item in question also be an article in and of itself. It is not enough that the item be indispensable to the function of the completed article. The code is like an idea that will eventually lead to the existence of an "article" — it is, in fact, necessary — but it is not something that can be measured or "imported." Therefore, software code, like an idea, is not a component of an "article."

Id. Labor's determination here relies solely on whether the software code is on a physical medium to be a component of an article. Labor fails to cite to any statute, regulation, or even past practice to support its determination. *See id.* The Court finds that Labor's determination again fails a reasoned analysis. *See* 19 U.S.C. § 2395(b). The Court noted in *CSC I*, that "if code is a process in the development of completed software, then code must also be considered a component of such software." *CSC I*, 29 CIT at ___, 366 F. Supp. 2d at 1372. Whether software code is tangible is not the crux of this analysis. Simply, "software [code] does not exist without a carrier medium. While it can be *transmitted* electronically, it must be ultimately stored on *some* carrier medium, such as a CD-Rom, floppy disk, hard drive, or the machine on which it is installed." *EDS II*, 29 CIT at ___, Slip Op. at 15 (emphasis retained). Under the HTSUS, a component is something that gives the item in question its essential character. *See* General Rules of Interpretation 3(b), HTSUS. Software code creates the essential character of software. As such, software code must be a component of software and thus an aspect in the production of software.

The second and third elements of the Court's remand instructions ordered Labor to examine whether Plaintiffs were engaged in the production of code and whether there was a shift in the production of code to India. *See CSC I*, 29 CIT at ___, 366 F. Supp. 2d at 1373. In its *Second Remand Negative Determination*, Labor "concluded that the plaintiffs did write software code, and that the code writing function was transferred to India." *Second Remand Negative Determination*, 70 Fed. Reg. at 52,130. The Court holds that Labor complied with the Court's remand instructions regarding these two elements.

The Court also ordered Labor to investigate whether the imported code from India is like or directly competitive with the software code formerly produced by Plaintiffs. *See CSC I*, 29 CIT at ___, 366 F. Supp. 2d at 1373. Labor determined that it was "impossible to answer whether" software code formerly written by Plaintiffs is like or directly competitive with the imported code from India because "that assumes the existence of articles to compare." *Second Remand Negative Determination*, 70 Fed. Reg. at 52,130. Labor stopped its analy-

sis because it determined that intangible software code is not an article and "clearly not 'like or directly competitive' with an actual article such as completed software on a physical medium." *Id.* The Court finds that Labor again has failed to conduct a reasoned analysis. Simply because Labor continues to repeat its tangibility requirement does not make the requirement come true. The Court clearly stated in *CSC I*, "[w]hile Labor may be correct that the code from India is not like or directly competitive with the completed software on physical media produced in the United States, it does not follow that the code from India is not like or directly competitive with a function used in producing the completed software in the United States." *CSC I*, 29 CIT at ___, 366 F. Supp. 2d at 1372. The Court inquired as to whether the code writing function that was shifted to India is like or directly competitive with the code formally written by Plaintiffs; not whether software code was comparable to completed software as Labor determined in its remand results. *See Second Remand Negative Determination*, 70 Fed. Reg. at 52,130. Labor acknowledges that the "software code written in India is similar to the software code plaintiffs wrote in the United States." *Id.* Since Labor has determined that the two are "similar," the Court finds that the code writing function that was shifted to India is "like" the code formally written by Plaintiffs satisfying the "like or directly competitive" requirement of 19 U.S.C. § 2272 (a)(2).

Finally, the Court ordered Labor to determine whether there has been or is likely to be an increase of imports of like or directly competitive articles by entities in the United States. *See CSC I*, 29 CIT at ___, 366 F. Supp. 2d at 1373. On remand, Labor surveyed "seven companies who produce software which might be considered like or directly competitive" with software produced by CSC. *See Second Remand Negative Determination*, 70 Fed. Reg. at 52,131.[5] Based on the survey responses, Labor determined that "none had imported software in a physical medium, and while some stated that new business opportunities were always possible, none had expressed that they were likely to import any software." *Id.* Labor also stated that while CSC has obviously "increased its 'delivery' of software code to the United States, but because software code" is not an article, "such an increase did not qualify" Plaintiffs for TAA certification. *Id.* The Court finds that the record does not support Labor's determination. Two of the companies surveyed clearly answered that they wrote software code overseas, which was then imported into the United States via the Internet. *See* Confidential 2Supp. Admin. R. at 145–52

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[5] Of the seven companies surveyed, the record indicates that Labor received answers of varying substance from six of the companies. *See* Confidential 2Supp. Admin. R. at 105–170. Of the six, three responded unambiguously as to whether they produced software similar to CSC, of which two answered affirmatively. *See id.*

& 169–70.[6] Furthermore, one of the two companies unambiguously stated that it considered its software competitive with software formally produced by Plaintiffs. *See id.* at 169–70. Labor does not acknowledge these two companies' imports in its *Second Remand Negative Determination* because arguably the software was not imported on a physical medium. The Court, however, finds the fact that other companies are importing software code over the Internet highly relevant. Since Plaintiffs formerly produced software code that is presently imported over the Internet and other companies are doing so of like and directly competitive software code, the Court finds that Plaintiffs have satisfied 19 U.S.C. § 2272(a)(2)(B)(ii)(III).

CONCLUSION AND ORDER

The Court finds that Labor's determination denying Plaintiffs' eligibility for certification to receive TAA benefits on the basis that Plaintiffs did not produce an article under the Trade Act is not supported by substantial record evidence and is not in accordance with law. Labor's interpretation of the law, that software code must be embodied on a physical medium to be an article under the Trade Act, is arbitrary and capricious. Accordingly, the Court again remands this matter to Labor with instructions to adequately explain its legal conclusion as to why software code is not an article under the Trade Act. Labor should specifically address how it can reasonably interpret the Trade Act, the HTSUS, and Customs' and the ITC's determinations to require that an article must be on a physical medium. If Labor cannot justify its tangibility requirement, then Labor should conclude that software code, regardless of its mode of entry, is an article under the Trade Act. Furthermore, the Court holds that substantial evidence on the record supports a determination that Plaintiffs have satisfied the requirements in 19 U.S.C. § 2272(a)(2)(B) for eligibility of TAA certification because there has been a shift in production to India by CSC of software code like or directly competitive with software code formerly written by Plaintiffs. The record also supports that there has been or is likely to be an increase in imports of software code.

Upon consideration of Labor's *Second Remand Negative Determination*, Plaintiffs' Comments, Labor's Response and the administrative record, it is hereby

ORDERED that Labor's *Second Remand Negative Determination is* not supported by substantial evidence or in accordance with law; and it is further

ORDERED that this matter is remanded to Labor with instructions to:

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[6] For business proprietary reasons, the identities of the two companies and the countries exported from are unnecessary details here.

(1) explain more fully how its interpretation of the term "article" requiring software code to be embodied on a physical medium under the Trade Act is in accordance with the HTSUS and Customs' and the ITC's interpretations thereof;

(2) if Labor cannot do so, then Labor should conclude with a reasoned explanation that software code, regardless of its mode of entry, is an article under the Trade Act;

(3) re-evaluate and explain, regardless of whether embodied on a physical medium, if code is a component of software;

(4) re-examine the record to determine whether there has been or is likely to be an increase of imports of like or directly competitive software code by entities in the United States; and it is further

ORDERED that if Labor concludes that software code is an article and that Plaintiffs satisfy 19 U.S.C. § 2272(a) to certify Plaintiffs for TAA eligibility; and it is further

ORDERED that Labor shall have until March 24, 2006, to file the remand results; and it is further

ORDERED that Plaintiffs shall have until April 14, 2006, to submit comments on the remand results; and it is further

ORDERED that rebuttal comments shall be submitted on or before April 28, 2006.

Slip Op. 06–18

UNITED STATES, Plaintiff, v. PAN PACIFIC TEXTILE GROUP, INC., AVIAT SPORTIF, INC., BUDGET TRANSPORT, INC., PRIME INTERNATIONAL AGENCY, BILLION SALES, EVER POWER CORP., AMERICAN CONTRACTORS INDEMNITY COMPANY, and THOMAS MAN CHUNG TAO, and STEPHEN SHEN YU JUANG, Defendants.

Before: Richard W. Goldberg,
Senior Judge
Court No. 01–01022

[Amount of defendants' liability for unpaid duties determined.]

Dated: January 31, 2006

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*); *Annmarie R. Highsmith*, Senior Attorney, Office of Associate Chief Counsel, U.S. Customs and Border Protection, U.S. Department of Homeland Security, for plaintiff.

Law Offices of John Weber (*John Weber* and *Jaime Lathrop*) for defendants Thomas Man Chung Tao, Pan Pacific Textile Group, Inc., and Aviat Sportif, Inc.

OPINION

Goldberg, Senior Judge: This case is before the Court on summary judgment to determine the amount of unpaid duties owed as a result of fraudulent customs violations. The Court has jurisdiction pursuant to 28 U.S.C. § 1582.

I. *BACKGROUND*

In *United States v. Pan Pacific Textile Group, Inc.*, 29 CIT ___, 395 F. Supp. 2d 1244 (2005) (“***Pan Pacific II***”), familiarity with which is presumed, the Court found defendants Thomas Man Chung Tao, Pan Pacific Textile Group, Inc., and Aviat Sportif, Inc. (together, “**Defendants**”) liable for duties unpaid as a result of their agent’s fraudulent customs violations under 19 U.S.C. § 1592. *Pan Pacific II*, 29 CIT at ___, 395 F. Supp. 2d at 1255. Noting that “Defendants dispute[d] both the valuation of the merchandise and the calculation of duties owed[,]” *id.* at ___ n.8, 395 F. Supp. 2d at 1248, and failing to find sufficient substantiation of that disputed calculation in the summary judgment briefs, the Court ordered supplemental briefing to determine if the amount of Defendants’ liability for unpaid duties could be established on summary judgment. Specifically, the Court ordered plaintiff the United States (in particular, U.S. Customs and Border Protection (“***Customs***”)) to “file with the Court a statement of the duties and interest owed by Defendants accompanied by an explanation of the calculation thereof[.]” Order on Slip Op. 05–107, 29 CIT ___, Order at 1 (Aug. 26, 2005).

On September 26, 2005, Customs filed the required statement and explanation. *See* Response to Court’s Request/Order Regarding Loss of Revenue (the “**Statement of Unpaid Duties**”). In the Statement of Unpaid Duties, Customs calculated Defendants’ liability for unpaid duties in the amount of $1,844,284.78, as well as interest totaling $1,791,115.37 as of September 26, 2005. Statement of Unpaid Duties at 2. To substantiate this calculation, Customs provided detailed declarations from two employees of the U.S. Department of Homeland Security: first, the import specialist responsible for calculating the amount of unpaid duties owed by Defendants and, second, the operating accountant responsible for calculating the interest owed by Defendants. *Id.*, Attach. 1–2. Customs also provided a spreadsheet listing, *inter alia*, each disputed entry, its dutiable value, the amount of duties already paid in connection with the entry, the amount of duty still owed in connection with the entry, and the corresponding amount of interest due. *Id.*, Attach. 3. Defendants filed a response to the Statement of Unpaid Duties on December 23, 2005 (“**Defs.’ Resp.**”), raising several objections to Customs’ calculation. Customs filed a reply on January 23, 2006, which included two additional declarations from employees of the U.S. Department of

Homeland Security, including a detailed declaration from the paralegal specialist responsible for the maintenance and release of Defendants' property which was seized by Customs during the underlying investigation.

This case is now once again properly before the Court on *de novo* review.[1] The sole issue to be determined here on summary judgment is whether a genuine dispute of material fact exists as to the amount of unpaid duties owed by Defendants by virtue of the Court's liability determination in *Pan Pacific II*. "[S]ummary judgment is proper if the pleadings [and the discovery materials] show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quotation marks omitted).

II. *DISCUSSION*

Defendants object to Customs' calculation of their liability for unpaid duties on three grounds, each of which is addressed below. After due consideration of Defendants' arguments, and for the reasons that follow, the Court concludes that Defendants have failed to raise a genuine issue of material fact as to Customs' calculation of the amount of unpaid duties owed by Defendants, and that Customs is entitled to judgment as a matter of law on this issue. Accordingly, the Court accepts Customs' calculation and fixes Defendants' liability for unpaid duties at that amount.

First, Defendants argue that Customs failed to offset the duties owed by the value of a portion of Defendants' entered merchandise seized by Customs during its investigation. Defs.' Resp. at 1. Defendants contend that there is a discrepancy between the value of merchandise seized by Customs and the value of merchandise ultimately returned to Defendants. *Id.* To establish this discrepancy, Defendants compare a letter sent by Customs at the time of seizure noting the *domestic value* of the seized entries ($2,010,720) to a letter sent by Customs at the time of remittance noting the *dutiable value* of the seized entries ($244,404). *Id.* at 1–2. Defendants contend that they are owed, in the form of a duty offset, the difference between these amounts. *Id.* at 2. What Defendants fail to appreciate is that they are comparing apples to oranges. Dutiable value and domestic value are not equivalent measures of entered merchandise.[2] They

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[1] In actions brought for the recovery of a monetary penalty claimed under 19 U.S.C. § 1592, all issues are tried *de novo*. *See* 19 U.S.C. § 1592(e)(1) (1999). The amount of duties owed to the United States has a direct correlation to the maximum amount of penalty that can be assessed. *See id.* § 1592(c).

[2] Domestic value is defined as the "price at which such or similar property is freely offered for sale at the time and place of appraisement[.]" 19 C.F.R. § 162.43(a) (2005). "Freight, profit *and duty* are therefore included." *United States v. Quintin*, 7 CIT 153, 158 n.3 (1984) (emphasis added). In contrast, transaction value is the general standard for de-

are different *types* of valuations performed by Customs during the course of importation. The fact that Customs referenced two different types of valuation in its letters to Defendants is of no legal consequence. These references simply do not imply that the value of Defendants' entries diminished while in Customs' custody. Indeed, Defendants have provided no evidence that the entries were actually damaged or otherwise suffered some diminution in value while in Customs' custody. Without proper presentment of such evidence in accordance with Customs' regulations, see 19 C.F.R. §§ 158.21–.30 (2005), Defendants are owed no duty offset as a result of Customs' seizure of Defendants' entered merchandise.

Second, Defendants argue that Customs overstated the total dutiable value of Defendants' entries. Defs.' Resp. at 2. Defendants note that an exhibit used in the criminal trial predating this civil action alleged the total dutiable value of Defendants' entries to be $3,468,951 – a much smaller amount than the $10,691,712[3] alleged by Customs here. *Id.* Unfortunately for Defendants, this observation is of no moment. The exhibit in question is not a comprehensive analysis of the 68 entries at issue in this case. Instead, the exhibit summarizes the invoices and entry records for only four of those entries. Customs' decision, in a wholly separate proceeding, to introduce an exhibit telling only part of the story of large-scale fraud underlying this case in no way undercuts the more comprehensive evidence presented by Customs to support its duty calculation here. Defendants are not entitled to an inference that no duties are currently owed on entries which do not appear on an exhibit only tangentially related to this case.

Third, Defendants contend that Customs erroneously calculated dutiable value by referencing the prices reflected on Defendants' invoices to end customers. Defs.' Resp. at 2. Instead, Defendants argue that Customs should have calculated dutiable value "by applying the concept of factory direct cost[,]" which arguably would have resulted in a lower dutiable value. *Id.* at 2. Presumably, Defendants' argument relies on the decision by the U.S. Court of Appeals for the Federal Circuit in *Nissho Iwai Am. Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992). In *Nissho Iwai*, the court held that, if certain criteria are present, an importer engaged in a multi-tiered transaction may claim that an entry's transaction value (upon which dutiable

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termining the dutiable value of imported merchandise. 19 U.S.C. § 1401a(a)(1)(A) (1999). Transaction value is defined as "the price actually paid or payable for the merchandise when sold for exportation to the United States" plus certain additional costs. *Id.* § 1401a(b)(1). The "price actually paid or payable" is defined as "the total payment . . . made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller." *Id.* § 1401a(b)(4)(A).

[3] This total dutiable value is much higher than the dutiable value noted in Customs' letter, referenced above with regard to Defendants' seized merchandise, because Customs seized only a portion of the 68 entries at issue in this case.

value is based) is the value of the entry's original sale from the manufacturer to a middleman, rather than value of the sale from that middleman to the end customer. *Id.* at 509. To take advantage of this alternative treatment, an importer must present Customs with evidence that certain criteria are met before liquidation of an entry or during the protest period immediately following liquidation. *See* Treas. Dec. 96–87 (Jan. 2, 1997), 31 Cust. B. & Dec. No. 1, *available at* 1997 CUSBUL LEXIS 2 at *8 (describing factors used to determine transaction value in multi-tiered transactions); 19 U.S.C. § 1484 (1999) (requiring importer to supply valuation documentation to Customs upon entry of merchandise); *id.* § 1514(a) (permitting protest of Customs' entry valuation). While it is possible that Defendants' entries could have qualified for this alternative treatment, Defendants have provided no evidence that documentation to this effect was furnished to Customs prior to liquidation or during the protest period. Absent such a showing, Customs appropriately calculated dutiable value by referencing the prices reflected on Defendants' invoices to end customers.

"Where a party has filed a properly-supported motion for summary judgment in accordance with Rule 56, the non-movant bears the burden of coming forward with 'specific facts showing that there is a genuine issue for trial.' " *Processed Plastic Co. v. United States*, 29 CIT ___ , ___ , 395 F. Supp. 2d 1296, 1299 (2005) (*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). With the Statement of Unpaid Duties and associated declarations and exhibit, Customs has now provided the proper support for its calculation of Defendants' liability for unpaid duties. As discussed above, Defendants have failed to allege any facts which call into question the accuracy of Customs' calculation. No *genuine* dispute of material fact exists here. Accordingly, the Court concludes that Customs is entitled to judgment as a matter of law on the issue of the amount of unpaid duties owed by Defendants.

III. *CONCLUSION*

For the foregoing reasons, the Court finds that Defendants have failed to raise a genuine dispute concerning Customs' duty calculation. The Court therefore accepts Customs' calculation and fixes Defendants' liability for unpaid duties at that amount, plus interest as provided by law. A separate order will be issued accordingly.

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GPO U.S. GOVERNMENT PRINTING OFFICE: 2006-320-063:80142